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Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1995

THE REVEREND THOMAS L. BASICH, et al.,

Petitioners,

v.

BOARD OF PENSIONS, EVANGELICAL LUTHERAN CHURCH IN AMERICA (ELCA), a Minnesota non-profit corporation; EVANGELICAL LUTHERAN CHURCH IN AMERICA (ELCA), a Minnesota non-profit corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Establishment Clause of the United States Constitution deprives a state trial court of subject matter jurisdiction over an action for breach of contract and breach of fiduciary duties brought by pension plan participants against the religious organization that manages their pension funds.

2. Whether the Minnesota Court of Appeal's decision that the Freedom of Conscience Clause of the Minnesota Constitution deprives a Minnesota trial court of subject matter jurisdiction over an action brought by pension plan participants against the religious organization that manages their pension funds violates the Due Process, Equal Protection, and Freedom of Speech Clauses of the United States Constitution.

LIST OF PARTIES

The petitioners in this matter include The Reverend Thomas L. Basich, The Reverend Matthew J. Basich, Advent Lutheran Church, Robert D. Hansen, Jack R. Kirkham, Michael Edwin Simonds, Lyle M. Bohlig, Edgar Gentz, The Reverend Judith H. Boal, The Rev. Doctor Gilbert E. Doan, Jr., The Reverend David R. Liefeld, The Reverend Gary G. Scott, The Reverend Doctor George R. Muenich, The Reverend John C. Earp, Earl Eargle, The Reverend Russell E. Saltzman, The Reverend Carsten Judd Ludder, The Reverend Brooke Walker, The Reverend David A. Carlson, Matthew C. Headley, The Reverend William C. Lindholm, The Reverend Dean W. Hoferer, The Reverend Thomas J. Lewis, Raymond Ehrman, The Reverend John W. Lee, The Reverend Emmett L. Schmitt, Richard Herrig, The Reverend Kerry G. Beauchaine, The Reverend Donald W. Baron, The Reverend Phillip R. Swenson, The Reverend Robert E. Ward, The Reverend Frederick M. Archer, The Reverend Doctor Charles Dickson, The Reverend Edward Frank Balint, The Reverend James R. Corgee, The Reverend Arthur C. Sziemeister, The Reverend William Earl Jernigan, The Reverend David Gensch, The Reverend Richard C. Jones, The Reverend Waldo Allen Pierson, The Reverend James A. Gullickson, David Moris Carlson, Ph.D., The Reverend Russell Burr, The Reverend Charles L. Koester, The Reverend Jack W. Bailey, The Reverend Rodney Eberhardt, The Reverend Lowell Albee, Jr., The Reverend Allen K. Griep.

The respondents in this matter include the Board of Pensions, Evangelical Lutheran Church in America and the Evangelical Lutheran Church in America.

RULE 29.6 LIST

Neither the Board of Pensions, Evangelical Lutheran Church in America, nor the Evangelical Lutheran Church in America has any parents or subsidiaries.

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BOARD OF PENSIONS, EVANGELICAL LUTHERAN CHURCH IN AMERICA (ELCA), a Minnesota non-profit corporation; EVANGELICAL LUTHERAN CHURCH IN AMERICA (ELCA), a Minnesota non-profit corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

Petitioners pray that a writ of certiorari issue to review the judgment, opinion, and order of the Minnesota Court of Appeals, which reversed the judgment of the District Court for Hennepin County, Minnesota.

OPINIONS BELOW

The District Court for Hennepin County, Minnesota denied Respondents' motions to dismiss or for summary judgment in an opinion dated February 7, 1994, which is included in the Appendix as Exhibit I. The District Court denied Respondents' second motions for summary judgment in an opinion dated April 18, 1995, which is included in the Appendix as Exhibit F.

The Minnesota Court of Appeals reversed the District Court's opinion of April 18, 1995 and dismissed this action in an opinion published as Basich v. Board of Pensions, 540 N.W.2d 82 (Minn. App. 1995), which is included in the Appendix as Exhibit B. The Supreme Court of Minnesota denied Petitioners' petition for review in an order dated January 25, 1996, which is included in the Appendix as Exhibit A.

STATEMENT OF JURISDICTION

The Minnesota Court of Appeals reversed the District Court's decision in an opinion published as Basich v. Board of Pensions, 540 N.W. 2d 82 (Minn. App. 1995), which is included in the Appendix as Exhibit B. The Supreme Court of Minnesota denied Petitioners' petition for review in an order filed on January 25, 1996, which is included in the Appendix as Exhibit A. This petition for certiorari is filed within 90 days of that date. This Court has jurisdiction to review the judgment of the Minnesota Court of Appeals by writ of certiorari pursuant to 28 U.S.C.§ 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment of the United States Constitution, in relevant part, provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The Fourteenth Amendment of the United State Constitution, in relevant part, provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 16 of Article I of the Minnesota Constitution provides:

> The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

Title 29 U.S.C. Section 1104 (a)(1)(A)-(D) of the Employee Retirement Income Security Act provides:

> Fiduciary Duties
>
> (a) Prudent man standard of care
>
> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --
>
> (A) for the exclusive purpose of:
> (i) providing benefits to participants and their beneficiaries; and
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

Title 26 U.S.C. Subchapter F - Exempt Organizations, Part I - General Rule § 501, in relevant part, provides:

> Exemption from tax on corporations, certain trusts, etc.
>
> (a) Exemption from taxation -- An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503 . . . .
>
> (c) List of exempt organizations . . . .
>
> (3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . .

STATEMENT OF THE CASE

The Board of Pensions, Evangelical Lutheran Church in America, and the Evangelical Lutheran Church in America (collectively "ELCA") are national Lutheran organizations that sponsor, manage, and administer a defined contribution pension plan ("Plan"), which they offer to local Lutheran congregations and their employees. These congregations are not required to accept the Plan and are free to obtain pension services from other organizations. Congregations that accept the Plan fund the Plan by contributing a percentage of their employees' income to their employees' individual accounts in the Plan. Petitioners are participants in the Plan who depend upon the Plan for their retirement benefits. Petitioners' individual accounts in the Plan are 100% vested. Each account is owned by an individual participant in the Plan -- not by the ELCA. Because the Plan is a defined contribution plan, it is the participants in the Plan -- and not the ELCA -- who bear the risk of investment loss.

The Plan is a "retirement income account" as defined by the Internal Revenue Code. See 26 U.S.C. § 403(b)(9). As such, it must be administered for the exclusive benefit of the participants in the Plan and their beneficiaries. See 26 U.S.C. § 401(a). Because the Plan is a "church plan," it is exempt from ERISA. See 29 U.S.C. § 1003(b)(2). However, through the plan document, the trust document, and the summary plan description, the ELCA and the Board of Pensions contractually promised to follow ERISA's fiduciary standards, which require pension plan fiduciaries to discharge their duties "solely in the interest of the participants and beneficiaries" and for the "exclusive purpose of providing benefits." 29 U.S.C. § 1104(a)(1)(A). The ELCA and the Board of Pensions also are subject to a similar duty of loyalty arising from the common law of trusts. See, e.g., Restatement of Trusts (Second) § 170(1) (1959).

Beginning in 1988, participants in the Plan were given the choice of investing their pension assets in two different categories of funds: social purpose funds and non-social purpose funds. Funds in the former category considered the "morality" of a potential investment when deciding how to invest pension funds; funds in the latter category made their investment decisions solely on the basis of traditional considerations of profit maximization consistent with safety. Petitioners had their pension monies invested in the non-social purpose funds.

In 1988, the ELCA began divesting the Plan's non-social purpose funds of securities of companies doing business in South Africa. The ELCA took this action in an attempt to further their religiously-motivated goal of opposing apartheid. The non-social purpose funds of the Plan suffered underperformance losses of more than $227 million between 1988 and 1991.

In response to the divestment, Petitioners filed this lawsuit in the District Court for Hennepin County, Minnesota on September 28, 1993, alleging that the ELCA breached contractual obligations and fiduciary duties when they divested the non-social purpose funds of securities of companies doing business in South Africa. Petitioners sought rescission from the Plan in order that they might invest their pension funds elsewhere. In November 1993, the ELCA brought motions to dismiss or for summary judgment, which the District Court denied on February 7, 1994. On March 6, 1995, just two months before this case was scheduled to go to trial, the ELCA brought new motions for summary judgment, arguing, for the first time, that their religious motivations in implementing the divestment policy in the non-social purpose funds deprived the District Court of subject matter jurisdiction over this action under the First Amendment of the United States Constitution and Section 16 of Article I of the

Minnesota Constitution. On April 18, 1995, the District Court denied those motions as well. The District Court said:

> There are several issue [sic] relating solely to contract concerns. The parties' expectations, rights and responsibilities to one another must be gleaned from the proceedings. The parties disagree as to the method of investment selection to be used by the Board and the reasonable expectations of the plaintiffs.

On April 25, 1995, the ELCA appealed the denial of their second motions for summary judgment to the Minnesota Court of Appeals. In their Notices of Appeal and Statements of the Case, the ELCA again asserted that a trial on the merits of Petitioners' claims would violate Respondents' rights under the First Amendment to the United States Constitution and Section 16 of Article I of the Minnesota Constitution. On November 28, 1995, the Minnesota Court of Appeals reversed the District Court and dismissed the case for lack of subject matter jurisdiction pursuant to the Establishment Clause of the United States Constitution and the Freedom of Conscience Clause of the Minnesota Constitution. On December 28, 1995, Petitioners filed a Petition for Review of the Decision of the Court of Appeals in the Minnesota Supreme Court. In an order filed January 25, 1996, the Minnesota Supreme Court denied Petitioners' Petition for Review.

Although the Establishment Clause issues raised here were argued before both the District Court and the Court of Appeals and included in the Petition for Review to the Minnesota Supreme Court, the issue of whether the Court of Appeals' interpretation of the Minnesota Constitution's Freedom of Conscience Clause violates the United States Constitution was not raised below. This Court has indicated, however, that the rule against deciding claims "not pressed or

passed upon below" may be a prudential restriction, not a jurisdictional one. See, e.g., Illinois v. Gates, 462 U.S. 213, 219 (1983) (discussing Terminiello v. Chicago, 337 U.S. 1 (1949) and Vachon v. New Hampshire, 414 U.S. 478 (1974)). Because the issues raised here are important ones involving fundamental rights protected by the United States Constitution, Petitioners ask the Court to exercise its discretion and grant certiorari.

REASONS FOR GRANTING THE WRIT

This case raises the important question of whether a religious organization may violate contractual and fiduciary duties without fear of liability so long as it is motivated by religious belief. The Minnesota Court of Appeals held that the trial court lacked subject matter jurisdiction over this matter because the ELCA's divestment policy was religiously motivated. The Court of Appeals based its decision on the Establishment Clause of the United States Constitution. In so doing, the Court of Appeals misinterpreted and misapplied decisions of this Court and radically extended the protection granted religious organizations by the Establishment Clause.

The Court of Appeals also based its decision on the Freedom of Conscience Clause of the Minnesota Constitution. The Court of Appeals' interpretation of the Freedom of Conscience Clause, however, violates Petitioners' rights under the Due Process, Equal Protection, and Freedom of Speech Clauses of the United States Constitution.

The Court should grant certiorari in this matter to correct the errors committed by the Court of Appeals and to clarify an area of law that affects every person who enters into a contract with a religious organization.

I. THE MINNESOTA COURT OF APPEALS MISINTERPRETED AND MISAPPLIED THE ESTABLISHMENT CLAUSE.

The Establishment Clause of the First Amendment is intended "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other." Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). In Lemon, this Court set out a tripartite test to determine whether government action violates the Establishment Clause. The Court held that government action survives an Establishment Clause challenge when: (1) it has a secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive entanglement with religion. Id. at 612-13. The basic principles articulated in Lemon have guided this Court's Establishment Clause decisions in over 30 cases. See Lee v. Weisman, 505 U.S. 577, 603 n.4 (1992) (Blackmun, J., concurring).

This case presents a unique set of circumstances never before directly addressed by this Court. Here, the Court of Appeals -- purporting to apply Lemon and other Supreme Court precedent -- held that the Establishment Clause deprives pension plan participants of their right to a trial on the merits in an action against the fiduciaries who sponsor, manage, and administer their pension accounts when those fiduciaries are religious organizations. The Court of Appeals' decision, however, rests on a misapplication of the Supreme Court precedent it cites.

First, the Court of Appeals misapplied Jones v. Wolf, 443 U.S. 595 (1979). In Jones, two factions of a congregation were in a dispute over who was entitled to possess and enjoy certain church property in Macon, Georgia. This Court held that it could, consistent with the Establishment Clause, apply "neutral principles of law" in a secular manner to resolve that dispute. In writing the opinion for the Court, Justice

Blackmun said: "There can be little doubt about the general authority of civil courts to resolve this question. The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum . . . ." Id. at 602.[1]

Citing Jones, the Court of Appeals held that this case could not be decided on neutral principles of law because the District Court would be required to review the ELCA's "divestment and equivalency policies" and "examine church doctrine and organization to determine whether a breach of contract occurred in this case." B-6. This conclusion stems from a fundamental misinterpretation of the ELCA's contractual and fiduciary duties. The ELCA owed a duty of loyalty to Petitioners that required the ELCA to discharge their duties "solely in the interests" of Petitioners and "[f]or the exclusive purpose of providing benefits" to Petitioners. M-2; N-3; O-6, 7. Thus, because the contract required the ELCA to act solely in the interests of Petitioners, the District Court would not have to review church doctrine or the ELCA's motives to determine whether the ELCA breached their contractual and fiduciary duties. The District Court would only have to consider whether or not the ELCA acted solely in the interests of Petitioners, which it could do using neutral principles of law. Judicial review of Petitioners' claims, therefore, would be entirely consistent with Jones.

Second, the Court of Appeals misapplied this Court's holding in Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976). The Court of Appeals cited Serbian for the, proposition that "[i]f a claim involves core issues of

[1] In Jones, this Court also held that "a state is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute." Jones, 443 U.S. at 602. Minnesota formally adopted the neutral principles of law approach to resolving church property disputes in Piletich v. Deretich, 323 N.W. 2d 696, 700-01 (Minn. 1982).

ecclesiastical concern, the potential for government entanglement in religious matters prevents judicial review." B-5. Petitioners note first that this case does not involve core issues of ecclesiastical concern. More important, however, the holding in Serbian is much narrower than the Court of Appeals' decision suggests. In Serbian, this Court merely held that the First and Fourteenth Amendments:

> permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.

Serbian, 426 U.S. at 725. This case is not about "internal discipline" or "the government and direction of subordinate bodies" of a religious organization. Thus, Serbian simply does not apply.

Finally, the Court of Appeals misapplied the third-prong of the Lemon test. This prong requires that an exercise of governmental authority "not foster an excessive government entanglement with religion." Lemon, 403 U.S. at 613 (emphasis added). The Court of Appeals found that a trial on the merits would foster such an excessive entanglement. The Court in Lemon, however, defined excessive entanglement to require a "comprehensive, discriminating, and continuing state surveillance." Id. at 619. A trial on the merits of Petitioners' claims would in no way require such a surveillance. In such a trial, the District Court would merely apply neutral principles of law in a secular manner, and the trial would be limited in scope and time. Thus, there is absolutely no basis for the

Court of Appeals' determination that the trial of this case would create excessive entanglement.

This Court has long recognized that "the [First] Amendment embraces two concepts -- freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct is subject to regulation for the protection of society." Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940). According to Justice Stewart, "this distinction reflects the judgment that, on the one hand, government has no business prying into people's minds or dispensing benefits according to peoples' religious beliefs, and, on the other, that acts harmful to society should not be immune from proscription simply because the actor claims to be religiously inspired." McDaniel v. Paty, 435 U.S. 618, 643 at * (1978) (Stewart J., concurring).

The ELCA has been, and continues to be, unimpeded in the cerebral sphere. Administering a pension plan, however, is a secular activity. Investing billions of dollars in pension monies which belong to Plan participants and their beneficiaries is not a religious practice. The Board of Pensions performs no sacerdotal function. It takes in contributions and pays out benefits, just as any insurance company does. When the ELCA divested the Petitioners' pension accounts without Petitioners' consent, that conduct violated the law. The ELCA should not be immune from proscription. If, "under the cloak of religion," the ELCA is allowed to act with impunity, however, the ELCA will be outside and above the law. Cantwell v. Connecticut, 310 U.S. 296, 306 (1940); Reynolds v. United States, 98 U.S. 145, 166-67 (1878). This Court should grant certiorari to correct the errors committed by the Court of Appeals and to clarify an area of law that affects every person who enters into a contract with a religious organization, especially pension contracts.

II. THE MINNESOTA COURT OF APPEALS' INTERPRETATION OF THE FREEDOM OF CONSCIENCE CLAUSE VIOLATES THE UNITED STATES CONSTITUTION.

A. The Court Of Appeals' Decision Violates The Due Process Clause.

This Court has long recognized that the Due Process Clause protects an individual's right to have a claim heard by a court of law. See, e.g., Logan v. Zimmermann Brush Co., 455 U.S. 422, 429 (1982). When an individual's claim involves a fundamental right, an individual may be denied the right to have the claim heard only if there is "a countervailing state interest of overriding significance." Boddie v. Connecticut, 401 U.S. 371, 377 (1971); see also Ortwein v. Schwab, 410 U.S. 656, 662-63 (1973) (Douglas, J., dissenting).

The right to enforce another party's contractual obligations is a fundamental right protected by the Constitution. See, e.g., U.S. Const. Art. I, § 10; cf. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 432 (1968) (quoting Senator Trumbull's description of the Civil Rights Act of 1866 as protecting "the great fundamental rights" including "the right to enforce rights in the courts [and] to make contracts"). Thus, a state can take away an individual's right to enforce the contractual obligations of another only if the state has a compelling interest in doing so. See, e.g., Boddie, 401 U.S. at 377-78; Ortwein, 410 U.S. at 663 (Douglas, J., dissenting).

No compelling interest supports the Court of Appeals' denial of Petitioners' right of access to the courts. The Court of Appeals held that the Minnesota Constitution's Freedom of Conscience Clause required dismissal of Petitioners' complaint for lack of subject matter jurisdiction because (1) "there is no question that the ELCA acted pursuant to a sincerely held religious belief"; (2) "review of this case would burden the

exercise of the ELCA's religious belief"; and (3) neither "peace," "safety", nor "acts of licentiousness" are an issue. B-11. This decision, however, has deprived Petitioners of a civil forum to protect their rights.[2] Thus, under the Due Process Clause, the Court of Appeals' decision can stand only if Minnesota has a compelling interest in closing its courts to disputes in which a party acts pursuant to a sincerely held religious belief, review of the dispute would burden the exercise of such belief, and neither peace, safety, nor acts of licentiousness are at issue.

Petitioners agree that Minnesota has an interest in protecting religious beliefs, as expressed in the Freedom of Conscience Clause. Petitioners further agree that such interest can be compelling in certain situations and justify a denial of access to the courts. In this case, however, Minnesota's interest in protecting religious beliefs does not outweigh Petitioners' right of access to the Courts for the purpose of enforcing constitutionally-protected contractual obligations.

In its interpretation of the Establishment Clause, this Court has struck the appropriate balance between an individual's right of access to the courts and a religious organization's right to be free from government interference. The rules developed by the Court protect an individual's right to enforce contractual obligations when such enforcement will not require a court to determine a religious organization's true beliefs. The test applied by the Court of Appeals, however, tips the balance too far in favor of religious organizations and denies access to the courts whenever a religious organization's breach of contract is religiously-motivated (since in all such

[2] Petitioners could not sue in the federal courts under ERISA because the Plan is exempt from ERISA. See 29 U.S.C. § 1003(b)(2). Petitioners could not seek redress within the Lutheran Church because the Lutheran Church does not have a judicatory body legally empowered to adjudicate breaches of contract and breaches of fiduciary duty. That responsibility resides in the civil authority.

situations enforcement of the contract will "burden the exercise" of the religious organization's beliefs), except when "health," "safety" or "acts of licentiousness" are at issue. This interpretation of the Freedom of Conscience Clause is too broad. This Court, therefore, should grant certiorari in this matter to determine the constitutionally-permitted scope of the Freedom of Conscience Clause.

B. The Court Of Appeals' Decision Violates The Equal Protection Clause.

Although this Court has often dealt with the issue of access to the courts in terms of due process, it also has recognized that the right of access is protected by the Equal Protection Clause. See, e.g., Long v. District Court, 385 U.S. 192, 193-95 (1966); Boddie v. Connecticut, 401 U.S. 371, 385-86, 387-89 (1971) (Douglas, J., concurring in the result and Brennan, J., concurring in part); Richard v. Hinson, 70 F.3d 415, 417 (5th Cir. 1995), petition for cert. filed, 64 U.S.L.W. 3642 (March 11, 1996) (No. 95-1469). The Equal Protection Clause "keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." Nordlinger v. Hahn, 505 U.S. 1, 10 (1992). In evaluating an equal protection claim, this Court has held that it must first determine the proper standard to use in reviewing the classification and it must then analyze the purpose of the classification to determine whether it satisfies that standard. See, e.g., United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174 (1980). If a classification impinges upon a fundamental right, strict scrutiny is the proper level of review. See, e.g., Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16 (1973).

Here, the Minnesota Court of Appeals' interpretation of the Freedom of Conscience Clause of the Minnesota

Constitution has the effect of creating two classes of pension plan participants: (1) participants (like Petitioners) whose plans are managed by religious organizations and (2) participants whose plans are managed by non-religious organizations. The former classification impinges upon a fundamental right -- the right of Petitioners to have access to the courts to have disputes regarding their contractual rights heard. See supra at 15. Thus, this classification can stand only if the purpose of the classification can withstand strict scrutiny. See, e.g., Murgia, 427 U.S. at 312; Rodriguez, 411 U.S. at 16. This classification cannot withstand strict scrutiny.

The only reason for discriminating between participants whose plans are managed by religious organizations and participants whose plans are not is to protect religious organizations' religious beliefs from infringement. When a religious organization freely enters into a contract and promises to provide the services that a secular organization provides, however, enforcement of the religious organization's promises cannot be said to infringe upon religious beliefs. Thus, when the ELCA has promised to provide the same retirement plan services provided by, for example, Merrill Lynch, it cannot complain when it is held to the same fiduciary standard as Merrill Lynch. A classification that discriminates between the customers of the ELCA and the customers of Merrill Lynch, therefore, is not rational, much less capable of surviving strict scrutiny. Thus, this Court should grant certiorari to determine whether the Court of Appeals' interpretation of the Freedom of Conscience Clause violates the Equal Protection Clause.

C. The Court Of Appeals' Decision Violates The Freedom Of Speech Clause.

It has long been recognized that forcing an individual to contribute money to a political purpose in which the individual

does not believe violates the Freedom of Speech Clause of the First Amendment. See, e.g., Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 & n.31 (1977) (quoting Thomas Jefferson's statement that "to compel a man to furnish money for the propagation of opinions which he disbelieves, is sinful and tyrannical"). That, however, is precisely the effect of the Court of Appeals' interpretation of the Minnesota Constitution. The Court of Appeals' decision allows the ELCA to use Petitioners' pension funds to support a divestment policy with which Petitioners disagree.[3] The Court of Appeals' interpretation of the Minnesota Constitution's Freedom of Conscience Clause, therefore, violates Petitioners' right to free speech. This Court should grant certiorari in order to prevent such deprivation from occurring.

[3] Petitioners agree that apartheid is morally wrong and should be opposed. They do not believe, however, that divestment was either an appropriate or effective means of opposing apartheid. Further, the real issue is that Petitioners believe that divestment itself is legally and morally wrong when imposed upon the pension accounts of Petitioners without Petitioners' consent.

CONCLUSION

For the foregoing reasons, Petitioners ask this Court to grant their petition for a writ of certiorari.

Respectfully submitted,

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STATE OF MINNESOTA

IN SUPREME COURT

C8-95-882 and CX-95-883

The Reverend Thomas L. Basich, et al.,
Respondents,

vs.

Board of Pensions, Evangelical Lutheran Church in America (ELCA),

Appellant (C8-95-882),
Defendant (CX-95-883),

Evangelical Lutheran Church in America (ELCA),

Defendant (C8-95-882),
Appellant (CX-95-883).

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of The Reverend Thomas L. Basich, et al. for further review be, and the same is, denied.

IT IS FURTHER ORDERED that the requests of The Minnesota Civil Liberties Union, Professor John H. Langbein and The Church of the Nazarene, et al. to serve and file briefs as amici curiae are accordingly denied.

Dated: January 25, 1996

BY THE COURT:

s/A.M. Keith
Chief Justice

STATE OF MINNESOTA

IN COURT OF APPEALS

C8-95-882
CX-95-883

Hennepin County
District Court File
No. 9316711

Kalitowski, Judge

The Reverend Thomas L. Basich, et al.,

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Lynn E. Basich
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vs.

Board of Pensions,
Evangelical Lutheran Church
in America (ELCA),

Appellant (C8-95-882),
Defendant (CX-95-883),

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Filed November 28, 1995
Office of Appellate Courts

SYLLABUS

The Establishment Clause of the First Amendment and the Freedom of Conscience Clause of the Minnesota Constitution deprive the district court of subject matter jurisdiction over a breach of contract action where respondent pastors allege that the Evangelical Lutheran Church of America wrongfully directed the church's board of pensions to invest pursuant to social and moral concerns rather than solely in the pastors' best financial interest.

Reversed.

Considered and decided by Kalitowski, Presiding Judge, Huspeni, Judge, and Davies, Judge.

OPINION

KALITOWSKI, Judge

Respondents, several Lutheran pastors, a lay employee and a Lutheran congregation (Pastors), filed this individual action for breach of contract and breach of fiduciary duty against appellants, the Evangelical Lutheran Church of America (ELCA) and the Board of Pensions of the Evangelical Lutheran Church of America (Board of Pensions). The ELCA and the Board of Pensions moved for summary judgment on the grounds that the First Amendment of the United States Constitution and the Freedom of Conscience Clause of the Minnesota Constitution deprive the court of subject matter jurisdiction in this dispute. The district court denied the motion.

FACTS

The Pastors participate in defined contribution pension accounts, contributed to by their congregations and administered by the Board of Pensions. The Pastors allege that the Board of Pensions has mismanaged funds by investing and divesting pursuant to social concerns rather than solely in the economic best interests of the plan participants.

The ELCA and the Board of Pensions are organized as Minnesota nonprofit corporations. The ELCA is comprised of 65 Synods governing 11,000 congregations. Each Synod elects representatives to the Churchwide Assembly, the highest legislative authority in the ELCA. When the Churchwide Assembly is not in session, the ELCA is governed by the Church Council. The Board of Pensions was established by the ELCA in 1988 to provide retirement income and benefits to Lutheran pastors and lay church employees. The ELCA Constitution provides that the Board of Pensions is to manage and operate the pension fund with the "design and policy adopted by the Churchwide Assembly." The Board of Pension's Articles of Incorporation provide that the Board is

> organized and shall be operated exclusively for religious purposes and exclusively for the benefit of and to assist in carrying out the purposes of the ELCA.

The ELCA Churchwide Assembly and Council have final authority and control over policies implemented by the Board of Pensions.

In 1977 the Lutheran World Federation Assembly declared that apartheid was so contrary to the Lutheran understanding of believers in Christ that it must be rejected as a matter of faith itself. The ELCA expressed its opposition to apartheid by passing a resolution to "see that none of our

ELCA pension funds will be invested in companies doing business in South Africa." The Board of Pensions responded in 1988 by adopting the "equivalency policy," whereby the Board of Pensions agreed to divest (and refrain from making new investments) in companies with South African holdings whenever the conditions of risk and return were equal between stocks and bonds held by the Board. The equivalency policy governed investment decisions until its repeal in 1993.

A dissenting group of Lutherans led by respondent Reverend Thomas Basich disagreed with the Churchwide Assembly's divestment policy. Basich and others published articles opposing the ELCA's decision to use its assets as a political weapon and condemning the Board of Pensions for "acquiescing" to the Churchwide Assembly's pressure on the issue of apartheid. Basich requested that he and others be allowed to withdraw their pension funds. The Board of Pensions denied this request. In response, Basich and others filed a derivative action suit against the Board of Pensions. This court held the Pastors did not have standing to bring a derivative suit. Basich v. Board of Pensions of Evangelical Lutheran Church in Am., 493 N.W.2d 293, 296 (Minn. App. 1992) The Pastors then filed this action for individual relief on the grounds of breach of contract and breach of fiduciary duty.

ISSUES

1. Does the First Amendment of the United States Constitution prevent the district court from exercising jurisdiction over this dispute?

2. Does the Freedom of Conscience Clause of the Minnesota Constitution prevent the district court from exercising jurisdiction over this dispute?

ANALYSIS

A motion for summary judgment shall be granted when there is no issue of material fact and a party is entitled to judgment as a matter of law. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993). None of the facts relevant to a determination of this summary judgment motion are disputed. The only remaining issue, therefore, is whether the federal or state constitution deprives the court of subject matter jurisdiction of the Pastors' claim. This issue is a question of law. A reviewing court is not bound by and need not give deference to a trial court's decision on a purely legal issue. Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984).

The ELCA and the Board of Pensions allege that the First Amendment to the United States Constitution deprives the district court of subject matter jurisdiction. The First Amendment provides that

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

U.S. Const. amend. I. The Establishment Clause cannot easily be reduced to a single test. Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2528 (1995). The Supreme Court has held that for an exercise of governmental authority to be valid under the Establishment Clause, it must: (1) have a secular purpose; (2) neither inhibit nor advance religion as its primary effect; and (3) not create excessive entanglement between church and state. Lemon v. Kutzman, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 2111 (1971). The Supreme Court has also applied the "principles of neutrality" test, requiring that civil courts hear only disputes which can be

determined on the basis of neutral principles of law. Jones v. Wolf, 443 U.S. 595, 602, 99 S. Ct. 3020, 3025 (1979).

Applying the Lemon factors, the parties do not allege that Minnesota contract and trust law lacks a secular purpose or that its primary effect inhibits or advances religion. Therefore, we need only consider whether review of this dispute would cause excessive entanglement between church and state and whether, under Jones, this dispute can be resolved by neutral principles of law.

Whether government action causes excessive entanglement depends on the nature of the intrusion into religious administration, the character and purpose of the involved institutions and the resulting relationship between the religious authority and government. Lemon, 403 U.S. at 614-15, 91 S. Ct. at 2112. If a claim involves core issues of ecclesiastical concern, the potential for government entanglement in religious matters prevents judicial review. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721-23, 96 S. Ct. 2372, 2386-87 (1976).

This court has held that the Establishment Clause prevents civil courts of Minnesota from considering a breach of contract claim brought by a pastor against her former church. Black v. Snyder, 471 N.W.2d 715, 720 (Minn. App. 1991), review denied (Minn. Aug. 29, 1991). In Black, a Lutheran associate pastor filed a discrimination charge against her supervising pastor alleging sexual harassment. Id. at 717-18. Shortly thereafter, the congregation voted to discharge Black and Black sued the church for, among other claims, breach of contract. Id. at 718. This court held that hearing Black's breach of contract claim would cause excessive entanglement because it would require the court to examine issues of church doctrine and governance and would require court review of the church's motives. Id. at 720.

This court has also refused to hear a defamation case to avoid excessive entanglement under the Establishment Clause.

Schoenhals v. Mains, 504 N.W.2d 233, 236 (Minn. App. 1993). The Schoenhals alleged that their pastor defamed them by communicating to the congregation that they had been poor parishioners. Id. at 234-35. The pastor alleged that his statements were based in the Bible and in the church's religious beliefs and practices. Id. at 235. This court found that while the pastor's statement appeared unrelated to church doctrine, court review of the defamatory statements would require an inquiry into the church's motives and disciplinary matters. Id. at 236. Accordingly, this court found that to prevent excessive entanglement, the district court must not hear the case. Id.

The Pastors argue that a review of this case will not require the court to entangle itself in issues of Lutheran doctrine. We disagree. Delegates to the Churchwide Assembly, the highest legislative authority of the Lutheran church, voted to divest funds from companies with holdings in South Africa and directed the Board of Pensions to implement the divestment policy. While the Board of Pensions is required to prudently invest its holdings, the ELCA created the Board to both provide for pastors' retirement needs and assist the ELCA in accomplishing doctrinal goals. The ELCA enacted the equivalency policy in an effort to further its social and doctrinal goals of opposing apartheid. Accordingly, any review of the Board of Pensions' divestment and equivalency policies would entangle the court in reviewing church doctrine and policy.

In addition, the district court would be required to examine church doctrine and organization to determine whether a breach of contract occurred in this case. The plan document is the primary "contract" between the parties. It provides that the Board of Pensions shall discharge its duties with the care that a prudent person would use in the conduct of an enterprise of like character with like aims. Thus, the district court would be required to examine the ELCA's

"aims" before it could determine the breach of contract issue. Such inquiry into church motives is forbidden by the Establishment Clause of the United States Constitution.

The Pastors also contend that this case can be resolved on neutral principles of contract and trust law. We disagree. The flaw in this contention is illustrated by the Pastors' admission that the ELCA could properly prohibit investments by the Board of Pensions in morally obnoxious commercial activity such as prostitution or pornography. There are no neutral principles of law that would enable a district court to distinguish between investments that Lutheran doctrine should find to be morally acceptable and those that it should find to be morally unacceptable. We conclude that the Establishment Clause of the First Amendment deprives the district court of subject matter jurisdiction in this dispute because review of this issue would require the district court to look beyond neutral principles of contract and trust law and entangle itself in issues of church doctrine.

The ELCA and the Board of Pensions allege that the Freedom of Conscience Clause of the Minnesota Constitution deprives the district court of subject matter jurisdiction. Article I, section 16 of the Minnesota Constitution provides that

> [t]he right of every man to worship God according to the dictates of his own conscience shall never be infringed * * * nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices

> inconsistent with the peace or safety of the state * * *.

The Freedom of Conscience Clause affords greater protection for religious liberties against government action than the federal constitution. State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990). In determining whether government action violates the Freedom of Conscience Clause, Minnesota courts consider whether: (1) the objector's belief is sincerely held; (2) the action burdens the exercise of religious beliefs; (3) the state's interest is compelling; and (4) the state action uses the least restrictive means. Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 865 (Minn. 1992). Under the Freedom of Conscience Clause, only governmental interests in "peace or safety" and against "acts of licentiousness" will excuse government imposition on religious freedom. Hershberger, 462 N.W.2d at 397.

This court has applied the Freedom of Conscience Clause recently to a discrimination claim brought by a lay church employee against the Eckankar church. Geraci v. Eckankar, 526 N.W.2d 391 (Minn. App. 1995), review denied (Minn. Mar. 14, 1995), cert. denied, 116 *S.* Ct. 75 (1995). Carol Geraci was a computer programmer for the Eckankar church who claimed that the church discriminated against her on the basis of gender. Id. at 395. The church alleged that Geraci was terminated for failing to work harmoniously with her coworkers in disregard of the sacred teachings of Eckankar. Id. This court concluded that while the state's interest in eradicating discrimination is compelling, it could not question Eckankar's basis for decisions claimed to be doctrinally related because to do so may compel the church to conform its religious beliefs with the government's or with the majority culture's beliefs. Id. at 399.

An analysis of the four elements of the Freedom of Conscience Clause test leads us to conclude that allowing the

district court's review of this matter would violate the Freedom of Conscience Clause. First, there is no question that the ELCA acted pursuant to a sincerely held religious belief by enacting the equivalency policy. The Lutheran World Federation declared that apartheid must be rejected as a matter of the Lutheran faith itself. Similarly, the Constituting Convention of the ELCA passed a resolution stating that divestment was the appropriate response to the "sin of apartheid."

Second, review of this case would burden the exercise of the ELCA's religious beliefs. If the civil courts were allowed to rescind pension plan contracts every time a group of dissenting participants disagreed with the Board of Pensions' social or moral investment strategies, the ELCA's ability to express its faith through social and moral investment would be substantially compromised. Additionally, as in Geraci, to review this case, the district court would be required to question the ELCA's basis for a decision that it contends was founded in Lutheran doctrine. Judicial inquiry into issues of church doctrine is itself a substantial burden. Id. Accordingly, a review of this case would burden the ELCA's exercise of religious beliefs.

Third, the government does not have a compelling interest in reviewing this case. The Pastors argue that there is an important governmental interest in providing a forum for review of this matter. We disagree. The forum best suited to review the Pastors' grievance is the Churchwide Assembly. The delegates to the Churchwide Assembly debated the appropriateness of the equivalency policy at length. As the highest legislative authority in the ELCA, the Churchwide Assembly's determination on this issue is final. The civil courts need not hear this case to ensure public "peace or safety" and the Pastors' breach of contract action does not allege an act of "licentiousness," as required by the Minnesota Freedom of Conscience Clause.

Because the Pastors have not alleged a compelling governmental interest in hearing this dispute, we need not address the fourth element of the Freedom of Conscience Clause test. We conclude that a review of this case would substantially burden the ELCA's exercise of religion. Therefore, the Freedom of Conscience Clause of the Minnesota Constitution deprives the district court of subject matter jurisdiction in this dispute.

DECISION

The district court erred in denying appellants' motion for summary judgment on the grounds that the court did not have subject matter jurisdiction. The district court's decision is reversed and this matter is dismissed pursuant to the Establishment Clause of the First Amendment and the Freedom of Conscience Clause of the Minnesota Constitution.

Reversed.

s/Thomas Kalitowski
11-17-95

STATE OF MINNESOTA

IN COURT OF APPEALS

The Reverend Thomas L. Basich, et al.,
Respondents,

vs.

Board of Pensions, Evangelical Lutheran Church in America (ELCA),

Appellant (C8-95-882),
Defendant (CX-95-883),

Evangelical Lutheran Church in America (ELCA),

Defendant (C8-95-882),
Appellant (CX-95-883).

ORDER

C8-95-882
CX-95-883

Considered and decided by Toussaint, Chief Judge, Parker, Judge, and Kalitowski, Judge.

BASED UPON THE FILE, RECORD AND PROCEEDINGS, AND FOR THE FOLLOWING REASONS:

These appeals were filed April 25, 1995. Appellants seek review of an April 18, 1995 order denying their motions to dismiss and for summary judgment on the ground that the district court lacks subject matter jurisdiction. This court

consolidated the appeals and questioned whether they should have been taken from a resulting judgment, because the April 18 order specifically directs entry of judgment. Respondents filed a motion to dismiss, arguing that the denial of appellants' motions is not immediately appealable. Appellants oppose the motion and seek an award of attorney fees.

An order denying defendant's motion for summary judgment is immediately appealable when defendant's motion is based on the district court's lack of subject matter jurisdiction. McGowan v. Our Savior's Lutheran Church, 527 N.W.2d 830, 833 (Minn. 1995). Respondents argue that the denial of appellants' motions is not appealable because the district court has subject matter jurisdiction over their contract claims. Respondents' argument pertains to the merits of the appeal, not to the issue of appealability. Because appellants' motions were based on a claim that the district court lacks subject matter jurisdiction to review matters allegedly involving religious beliefs and practices, appellants are entitled to immediate review of the denial of the motions.

Generally, where an otherwise appealable order specifically directs entry of judgment, the proper appeal is from the judgment. See Saric v. Stover, 451 N.W.2d 65 (Minn. App. 1990). Appellants indicate that judgment was entered pursuant to the April 18 order on May 11, 1995. Under the unique circumstances of this case, and in the interests of judicial economy, we will allow the appeal to proceed. The appeal is limited to the issue of subject matter jurisdiction. We decline to award attorney fees against respondents.

IT IS HEREBY ORDERED:

1. Respondents' motion to dismiss is denied.

2. Appellants' requests for attorney fees are denied.

3. The appeals shall proceed pursuant to the rules of civil appellate procedure.

4. The Clerk of the Appellate Courts shall provide copies of this order to the Honorable Harry Seymour Crump, counsel of record, and the court administrator.

Dated: May 30, 1995

BY THE COURT

s/Edward Toussaint
Chief Judge

AW/dr

STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF HENNEPIN **FOURTH JUDICIAL DISTRICT**

CASE TYPE 3: CONTRACT

The Reverend Thomas L. Basich,
The Reverend Matthew J. Basich,
Advent Lutheran Church,
Robert D. Hansen,
Jack R. Kirkham,
Michael Edwin Simonds,
Lyle M. Bohlig,
Edgar Gentz,
The Reverend Judith H. Boal,
The Reverend Doctor Gilbert E. Doan, Jr.,
The Reverend David R. Liefeld,
The Reverend Gary G. Scott,
The Reverend Doctor George R. Muenich,
The Reverend William J. Cork,
The Reverend John C. Earp,
Earl Eargle,
The Reverend Russell E. Saltzman,
The Reverend Carsten Judd Ludder,
The Reverend Brooke Walker,
The Reverend David A. Carlson,
Matthew C. Headley,
The Reverend William C. Lindholm,
The Reverend Dean W. Hoferer,
The Reverend Thomas J. Lewis,
Raymond Ehrman,
The Reverend John W. Lee,
The Reverend Emmett L. Schmitt,
Richard Herrig,

NOTICE OF APPEAL TO COURT OF APPEALS

Trial Court Case No. 93-16711

DATE OF ORDER: April 18, 1995

The Reverend Kerry G. Beauchaine,
The Reverend Donald W. Baron,
The Reverend Phillip R. Swensson,
The Reverend Robert E. Ward,
The Reverend Frederick M. Archer,
The Reverend Doctor Charles Dickson,
The Reverend Edward Frank Balint,
The Reverend James R. Corgee,
The Reverend Arthur C. Sziemeister,
The Reverend William Earl Jernigan,
The Reverend David Gensch,
The Reverend Richard C. Jones,
The Reverend Waldo Allen Pierson,
The Reverend James A. Gullickson,
David Morris Carlson, Ph.D.,
The Reverend Russell Burr,
The Reverend Charles L. Koester,
The Reverend Jack W. Bailey,
The Reverend Rodney Eberhardt,
The Reverend Lowell Albee, Jr.,
The Reverend Allen K. Griep,

Plaintiffs,

vs.

Board of Pensions, Evangelical Lutheran Church in America (ELCA); and
Evangelical Lutheran Church in America (ELCA),

Defendants.

TO: Clerk of the Appellate Court
Minnesota Judicial Center
St. Paul, MN 55155

PLEASE TAKE NOTICE that defendant Evangelical Lutheran Church in America appeals to the Court of Appeals of the State of Minnesota from an order of the Court filed on April 18, 1995, denying defendant's motion for dismissal for lack of subject matter jurisdiction.

Dated: April 24, 1995

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STATE OF MINNESOTA
IN COURT OF APPEALS

CASE TITLE:

Board of Pensions, Evangelical Lutheran Church in America (ELCA); and Evangelical Lutheran Church in America (ELCA),	**STATEMENT OF THE CASE OF APPELLANT EVANGELICAL LUTHERAN CHURCH IN AMERICA**
Appellants,	TRIAL COURT CASE NUMBER: 93-16711
vs.	
The Reverend Thomas L. Basich, The Reverend Matthew J. Basich, Advent Lutheran Church, Robert D. Hansen, Jack R. Kirkham, Michael Edwin Simonds, Lyle M. Bohlig Edgar Gentz, The Reverend Judith H. Boal, The Reverend Doctor Gilbert E. Doan, Jr., The Reverend David R. Liefeld, The Reverend Gary G. Scott, The Reverend Doctor George R. Muenich, The Reverend William J. Cork, The Reverend John C. Earp, Earl Eargle, The Reverend Russell E. Saltzman, The Reverend Carsten Judd Ludder, The Reverend Brooke Walker, The Reverend David A. Carlson,	APPELLATE COURT CASE NUMBER:

Matthew C. Headley,
The Reverend William C. Lindholm,
The Reverend Dean W. Hoferer,
The Reverend Thomas J. Lewis,
Raymond Ehrman,
The Reverend John W. Lee,
The Reverend Emmett L. Schmitt,
Richard Herrig,
The Reverend Kerry G. Beauchaine,
The Reverend Donald W. Baron,
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The Reverend Robert E. Ward,
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The Reverend Edward Frank Balint,
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The Reverend Arthur C. Sziemeister,
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The Reverend Waldo Allen Pierson,
The Reverend James A. Gullickson,
David Morris Carlson, Ph.D.,
The Reverend Russell Burr,
The Reverend Charles L. Koester,
The Reverend Jack W. Bailey,
The Reverend Rodney Eberhardt,
The Reverend Lowell Albee, Jr.,
The Reverend Allen K. Griep,

Respondents.

---

1. Fourth Judicial District, Hennepin County District Court, the Honorable Harry Seymour Crump presiding.

2. This appeal is from an Order Denying Defendants' Motions for Summary Judgment dated April 18, 1995 in which the Evangelical Lutheran Church in America's motion to dismiss for lack of subject matter jurisdiction was denied. Such an order "is appealable as of right independent of Rule 103.03." Judd v. State by Humphrey, 488 N.W.2d 507, 508 (Minn. Ct. App. 1992). See also McGowan v. Our Savior's Lutheran Church, Minnesota Supreme Court (Finance and Commerce, February 17, 1995, p. 19, February 24, 1995, p. 19); Hunt v. Nevada State Bank, 285 Minn. 77, 172 N.W.2d 292, 300 (1969), cert. denied, 397 U.S. 1010 (1970); Walker and Co., Ltd. v. Lawrence, 416 N.W.2d 154, 156 (Minn. Ct. App. 1987); Snow v. Snow, 369 N.W.2d 581, 583 (Minn. Ct. App. 1985).

3. Appeal and Error -- Jurisdictional Question: First Amendment of the United States Constitution (the religion clauses) and Article I, Section 16 of the Minnesota Constitution (the freedom of conscience clause).

4. The plaintiffs instituted this action seeking rescission of their alleged contracts with the defendant Board of Pensions of the Evangelical Lutheran Church in America (the "Board") and transferral of their pension funds held and managed by the Board. The plaintiffs claim that adoption of an "equivalency policy" by the Board breached their alleged contract with the Board and the Evangelical Lutheran Church in America (the "Church"). The "equivalency policy" provided that whenever the conditions of risk and return are equal in the choice among stocks and bonds, the stocks or bonds of companies not doing business in South Africa could be given preference. Plaintiffs also claim that certain actions taken with respect to proxy voting violated an alleged duty to consult the plaintiffs prior to taking those actions. The plaintiffs also claim that the Board is controlled by the Church.

The defendants contend that the Trial Court is prohibited from asserting subject matter jurisdiction over this matter

pursuant to the First Amendment of the United States Constitution and Article 1, § 16, the Freedom of Conscience Clause, of the Minnesota Constitution.

The defendants further contend that this matter is a dispute over the proper interpretation and application of Lutheran doctrine, a matter which should be and has been resolved within the Church at its highest levels. This is not a matter over which the secular courts have jurisdiction. Nor is the adoption of the "equivalency policy" a breach of duty such a policy having been specifically determined to be consistent with fiduciary duty. No contract exists between the Church and the plaintiffs concerning pension plan administration. The plaintiffs, having incurred no losses and suffered no material breach, are not entitled to rescission.

After an earlier summary judgment order dismissing two of the plaintiffs' three claims, only their "contract" claims survived. Upon the defendants' further motions for summary judgment following discovery, the trial court refused to dismiss the action for lack of subject matter jurisdiction. The trial court also refused to grant summary judgment on the "contract" claims because of factual issues.

5. The subject of this appeal is the trial court's refusal to dismiss plaintiffs' action for lack of subject matter jurisdiction. Under the religion clauses of the First Amendment to the United States Constitution and the freedom of conscience clause of the Minnesota Constitution, the secular courts should not become enmeshed in this matter which involves issues of "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them."

6. A transcript is required.

7. Oral argument is requested.

8. Formal briefs are necessary.

Dated: April 24, 1995

Attorneys for Appellant the Evangelical Lutheran Church in America:

LeVANDER, ZOTALEY, VANDER LINDEN & RYDLAND

By s/s

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Board of Pensions:

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Attorneys for Respondent:
The Reverend Thomas L. Basich, et al.

Lynn E. Basich, #149226
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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Case Type 3: Contract

The Reverend Thomas L. Basich,
The Reverend Matthew J. Basich,
Advent Lutheran Church,
Robert D. Hansen,
Jack R. Kirkham,
Michael Edwin Simonds,
Lyle M. Bohlig,
Edgar Gentz,
The Reverend Judith H. Boal,
The Reverend Doctor Gilbert E. Doan, Jr.,
The Reverend David R. Liefeld
The Reverend Gary G. Scott,
The Reverend Doctor George R. Muenich,
The Reverend William J. Cork,
The Reverend John C. Earp,
Earl Eargle,
The Reverend Russell E. Saltzman,
The Reverend Carsten Judd Ludder,
The Reverend Brooke Walker,
The Reverend David A. Carlson,
Matthew C. Headley,
The Reverend William C. Lindholm,
The Reverend Dean W. Hoferer,
The Reverend Thomas J. Lewis,
Raymond Ehrman,
The Reverend John W. Lee,
The Reverend Emmett L. Schmitt,
Richard Herrig,

NOTICE OF APPEAL TO COURT OF APPEALS

TRIAL COURT CASE NUMBER: 93-16711

DATE OF ORDER: April 18, 1995

The Reverend Kerry G. Beauchaine,
The Reverend Donald W. Baron,
The Reverend Phillip R. Swensson,
The Reverend Robert E. Ward,
The Reverend Frederick M. Archer,
The Reverend Doctor Charles Dickson,
The Reverend Edward Frank Balint,
The Reverend James R. Corgee,
The Reverend Arthur C. Sziemeister,
The Reverend William Earl Jernigan,
The Reverend David Gensch,
The Reverend Richard C. Jones,
The Reverend Waldo Allen Pierson,
The Reverend James A. Gullickson,
David Moris Carlson, Ph.D.,
The Reverend Russell Burr,
The Reverend Charles L. Koester,
The Reverend Jack W. Bailey,
The Reverend Rodney Eberhardt,
The Reverend Lowell Albee, Jr.,
The Reverend Allen K. Griep,

Plaintiffs,

vs.

Board of Pensions, Evangelical
Lutheran Church in America (ELCA); and
Evangelical Lutheran Church in America (ELCA),

Defendants.

TO: Clerk of the Appellate Courts
Minnesota Judicial Center
St. Paul, MN 55155

Please take notice that defendant the Board of Pensions of the Evangelical Lutheran Church in America appeals to the Court of Appeals of the State of Minnesota from an order of the court filed on the date shown above, denying defendant's motion to dismiss for lack of subject matter jurisdiction, on the grounds that trial of the above-titled action would violate defendant's rights under the First Amendment of the United States Constitution and Article I, § 16 of the Minnesota Constitution.

Dated: April 24, 1995.

FAEGRE & BENSON PROFESSIONAL
LIMITED LIABILITY PARTNERSHIP

s/s

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MLL272B7.WP5

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

The Reverend Thomas L. Basich, et al.,

Plaintiff,

vs.

Board of Pensions, Evangelical Lutheran Church in America (ELCA); and Evangelical Lutheran Church in America (ELCA),

Defendants.

D.C. File No. 93-16711

ORDER DENYING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Robert C. Bell and Lynn E. Basich appeared on behalf of plaintiffs. Bonnie M. Fleming and Thomas H. Bennin appeared on behalf of Defendant Board of Pensions. Robert H. Rydland appeared on behalf of Defendant ELCA.

The above-captioned matter came on for hearing of Monday, April 3, 1995 before the Honorable Harry Seymour Crump at Brookdale, Division 2, 6125 Shingle Creek Parkway, Brooklyn Center, Minnesota 55430.

Defendant Board of Pensions of the Evangelical Lutheran Church in America (the "Board of Pensions") and Defendant Evangelical Lutheran Church in America (the "ECLA") each brought Motions for Summary Judgment pursuant to Minn.R. Civ. P. 56. Defendant ELCA also brought a Motion to Dismiss for lack of subject matter jurisdiction pursuant to Minn. R. Civ. P. 12.08(c).

The Court, having heard the arguments of counsel, having reviewed the memoranda and affidavits submitted by the

parties, having considered all of the files, records and proceedings in this action, and being otherwise fully advised,

IT IS HEREBY ORDERED:

1. Defendant Board of Pensions' motion for summary judgment is DENIED.

2. Defendant Evangelical Lutheran Church in America's motion for summary judgment is DENIED.

3. Defendant Evangelical Lutheran Church in America's motion to dismiss for lack of subject matter jurisdiction is DENIED.

4. Defendants' joint motion for sanctions is DENIED.

5. Defendant Board of Pensions' motion to compel more complete answers to expert witness interrogatories is denied.

There being no just reason for delay,

LET JUDGMENT BE ENTERED ACCORDINGLY,
BY THE COURT:

s/s
Harry Seymour Crump
District Court Judge

DATED: April 18, 1995

MEMORANDUM

Summary judgment is a proceeding designed to determine if issues of fact exist, but, it is not a trial of the issues of fact. Corwine v. Crow Wing County, 244 N.W.2d 482 (Minn. 1976). Rule 56.03 of the Minnesota Rule of Civil Procedure provides that "[j]udgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." While summary judgment is entitled to secure a just, speedy, and inexpensive disposition, it is not designed as a substituted for a court or jury trial where there are material factual issues to be determined. Vieths v. Throp Finance Co., 232 N.W.2d 776 (Minn. 1975).

There are several issue relating solely to contract concerns. The parties' expectations, rights and responsibilities to one another must be gleaned from the proceedings. The parties disagree as to the method of investment selection to be used by the Board and the reasonable expectations of the plaintiffs.

For the foregoing reasons, the summary judgment motions brought by Board of Pensions and the Evangelical Lutheran Church are denied.

H.S.C.

STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF HENNEPIN **FOURTH JUDICIAL DISTRICT**

CASE TYPE 3: CONTRACT

The Reverend Thomas L. Basich, et al. COURT FILE NO.: 93-16711

Plaintiffs,

vs.

Board of Pensions, Evangelical Lutheran Church in America (ELCA); and Evangelical Lutheran Church in America (ELCA),

Defendants.

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OF DEFENDANT EVANGELICAL LUTHERAN CHURCH IN AMERICA

TO: PLAINTIFFS THE REVEREND THOMAS L. BASICH, ET AL. AND THEIR ATTORNEYS, ROBERT C. BELL, PETERSON, BELL, CONVERSE & JENSEN, SUITE 327, LUTHERAN BROTHERHOOD BLDG., 2780 NORTH SNELLING AVENUE, ROSEVILLE, MN 55113, AND LYNN BASICH, 1036 WOODLYNN AVENUE, ROSEVILLE, MN 55113.

NOTICE OF MOTION

PLEASE TAKE NOTICE that the undersigned will bring the following Motion at a hearing to be held before The Honorable Harry Seymour Crump, Judge of District Court, at

Brookdale, Division 2, 6125 Shingle Creek Parkway, Brooklyn Center, Minnesota 55430, at 12:00 Noon on April 3, 1995, or as soon thereafter as counsel may be heard.

MOTION

Defendant Evangelical Lutheran Church in America (the "Church") hereby moves the Court pursuant to Minn. R. Civ. P. 56.02 and 12.08(c) for judgment dismissing all claims asserted by Plaintiffs against the Church in the above-entitled action. Plaintiffs' First Amended Complaint fails to state a cognizable claim against the Church and this Court lacks jurisdiction of the subject matter pursuant to the First Amendment of the United States Constitution and the freedom of conscience clause of the Minnesota Constitution.

This motion is based upon all of the files, records and proceedings in this action, and upon a Memorandum of Law to be filed in accordance with Minn. Gen. R. Prac. 115.03.

Dated: March 6, 1995 **LeVANDER, ZOTALEY, VANDER LINDEN & RYDLAND**

By s/s
Robert H. Rydland (#94948)
625 Marquette Avenue
720 Northstar West
Minneapolis, MN 55402
Telephone: 612/339-6841

ATTORNEYS FOR DEFENDANT EVANGELICAL LUTHERAN CHURCH IN AMERICA

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT
Case Type 3: Contract

The Reverend Thomas L. Basich,
The Reverend Matthew J. Basich,
Advent Lutheran Church,
Robert D. Hansen,
Jack R. Kirkham, Court File No. 93-16711
Michael Edwin Simonds,
Lyle M. Bohlig,
Edgar Gentz, **NOTICE**
The Reverend Judith H. Boal, **OF MOTION**
The Reverend Doctor Gilbert E. Doan, Jr., **AND MOTION**
The Reverend David R. Liefeld, **FOR SUMMARY**
The Reverend Gary G. Scott, **JUDGMENT OF**
The Reverend Doctor George R. Muenich, **DEFENDANT**
The Reverend William J. Cork, **BOARD OF**
The Reverend John C. Earp, **PENSIONS OF**
Earl Eargle, **THE EVANGELICAL**
The Reverend Russell E. Saltzman, **LUTHERAN CHURCH**
The Reverend Carsten Judd Ludder, **IN AMERICA**
The Reverend Brooke Walker,
The Reverend David A. Carlson,
Matthew C. Headley,
The Reverend William C. Lindholm,
The Reverend Dean W. Hoferer,
The Reverend Thomas J. Lewis,
Raymond Ehrman,
The Reverend John W. Lee,
The Reverend Emmett L. Schmitt,
Richard Herrig,
The Reverend Kerry G. Beauchaine,
The Reverend Donald W. Baron,

The Reverend Phillip R. Swensson,
The Reverend Robert E. Ward,
The Reverend Frederick M. Archer,
The Reverend Doctor Charles Dickson,
The Reverend Edward Frank Balint,
The Reverend James R. Corgee,
The Reverend Arthur C. Sziemeister,
The Reverend William Earl Jernigan,
The Reverend David Gensch,
The Reverend Richard C. Jones,
The Reverend Waldo Allen Pierson,
The Reverend James A. Gullickson,
David Moris Carlson, Ph.D.,
The Reverend Russell Burr,
The Reverend Charles L. Koester,
The Reverend Jack W. Bailey,
The Reverend Rodney Eberhardt,
The Reverend Lowell Albee, Jr., and
The Reverend Allen K. Griep,

Plaintiffs,

vs.

Board of Pensions, Evangelical
Lutheran Church in America (ELCA); and
Evangelical Lutheran Church in America (ELCA),

Defendants.

TO: Plaintiffs and their attorneys Robert C. Bell, 310 Rosedale Towers, 1700 West Highway 36, Roseville, MN 55113-4015, and Lynn E. Basich, 3000 North Hamline Avenue, Roseville, MN 55113-1698; and

Defendant Evangelical Lutheran Church in America and its attorney, Robert H. Rydland, 625 Marquette Avenue, 720 Northstar West, Minneapolis, MN 55402:

PLEASE TAKE NOTICE that at a hearing to be held before The Honorable Harry Seymour Crump, Judge of District Court, at Brookedale, Division 2, 6125 Shingle Creek Parkway, Brooklyn Center, Minnesota 55430, at 12:00 noon, on April 3, 1995, or as soon thereafter as counsel may be heard, defendant Board of Pensions of the Evangelical Lutheran Church in America ("Board of Pensions") will move pursuant to Minn. R. Civ. P. 56 for summary judgment dismissing with prejudice all claims asserted by plaintiffs against the Board of Pensions in the above-entitled action. The grounds for this motion are as follows:

1. Plaintiffs' claim for breach of contract and request for rescission fails to state a claim upon which relief can be granted against the Board of Pensions because, as a matter of law, no contract exists between plaintiffs and the Board of Pensions. Under well-established law, a trust relationship -- not a contractual relationship -- exists between trust beneficiaries such as plaintiffs and a trustee such as the Board of Pensions. Plaintiffs' claim that defendants breached their fiduciary duties to plaintiffs by investment decisions motivated by social and political criteria and by voting shares of stock held by the Plan without consulting the beneficiaries. Plaintiffs did adopt and implement an Equivalency Policy which did apply to all funds held by the Board of Pensions. The Board of Trustees of the Board of Pensions are required to vote the shares of stock held by the Plan and have the sole power to do so. As a matter of law the actions of the Board of Trustees were proper. Accordingly no breach of fiduciary duty exists.

2. Because no contract exists, plaintiffs cannot state a claim for breach of contract against the Board of Pensions

arising from the Board of Pensions' administration of pension funds. Moreover, even if a contract did exist between plaintiffs and the Board of Pensions, rescission is not available to remedy the grievances which plaintiffs allege, because there was no material breach of contract and rescission would cause more harm to the other plan beneficiaries than it would benefit these plaintiffs. Plaintiffs, claim should therefore be dismissed with respect to the Board of Pensions.

3. Further, plaintiffs' claim involves a doctrinal dispute within the Evangelical Lutheran Church in America ("ELCA"), a disagreement as to the proper interpretation and application of religious doctrines, over which this court cannot constitutionally assert jurisdiction.

4. This motion is based upon all of the files, records and proceedings in this action, upon the affidavits of John G. Kapanke and David G. Adams and upon the Memorandum of Law of Defendant Board of Pensions of the Evangelical Lutheran Church in America in Support of Motion for Summary Judgment.

DATED: March 6, 1995 FAEGRE & BENSON
Professional Limited Liability
Partnership

s/s
Bonnie M. Fleming, # 30077
Thomas H. Bennin # 120789
Eric E. Jorstad #216987
Brendan W. Randall # 223475
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Attorneys for Defendant Board
of Pensions of the Evangelical
Lutheran Church in America

MTT0EDE5.WP5

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

The Reverend Thomas L. Basich,
The Reverend Matthew J. Basich, File No: CT 93-16711
Advent Lutheran Church,
Robert D. Hansen,
Jack R. Kirkham, **ORDER**
Michael Edwin Simonds,
Lyle M. Bohlig,
Edgar Gentz,
The Reverend Judith H. Boal,
The Reverend Doctor Gilbert e. Doan, Jr.,
The Reverend David R. Liefeld
The Reverend Gary G. Scott,
The Reverend Doctor Greg R. Muenich,
The Reverend William J. Cork,
The Reverend John C. Earp,
Earl Eargle,
The Reverend Russell E. Saltzman,
The Reverend Carsten Judd Ludder,
The Reverend Brooke Walker,
The Reverend David A. Carlson,
Matthew C. Headley,
The Reverend William C. Lindholm,
The Reverend Dean W. Hoferer
The Reverend Thomas J. Lewis
Raymond Ehrman
The Reverend John W. Lee,,
The Reverend Emmett L. Schmitt,
Richard Herrig
The Reverend Kerry G. Beauchaine,
The Reverend Donald W. Baron,

Plaintiffs,

vs.

Board of Pensions, Evangelical
Lutheran Church in America (ELCA)
and Evangelical Lutheran Church in America (ELCA),

Defendants.

The above-entitled matter came for a hearing before the Honorable Harry Seymour Crump on December 16, 1993, at the Hennepin County Government Center in the City of Minneapolis, Minnesota, upon cross motions for summary judgment.

Plaintiffs were represented by Robert Bell, Esq. Defendant Board of Pensions of the Evangelical Lutheran Church, was represented by Bonnie M. Fleming, Esq. Robert H. Rydland, Esq. appeared on behalf of the Defendant Evangelical Lutheran Church in America.

Based upon the files, records and proceedings held herein,

IT IS HEREBY ORDERED:

1. Defendants' motion for summary judgment is denied as to Count I of the Plaintiff's Complaint.
2. Count II and Count III of the Plaintiff's Complaint are hereby dismissed as being Moot.
3. The attached memorandum is incorporated herein by reference.

LET JUDGMENT BE ENTERED ACCORDINGLY

BY THE COURT:

Dated: 2-7-94

s/s
The Honorable Harry Seymour Crump
Judge of District Court

MEMORANDUM

FACTS

Defendant Evangelical Lutheran Church ("ELCA") is a nonprofit corporation organized pursuant to the Minnesota Nonprofit Corporation Act, Minn. Stat. Chapter 317A. Board of Pensions of the Evangelical Lutheran Church ("Board of Pensions") is a Minnesota nonprofit corporation which was formed for the purpose of providing pension and welfare benefits for pastors, associates in ministry, and lay persons working within the structure of the ELCA. The Board of Pensions was created and incorporated pursuant to the ELCA's Constitution. A 21-member Board of Trustees acts as the Board of Pensions' board of directors. Those individuals are elected by the ELCA churchwide assembly. The Board of Pensions administers retirement income accounts.

Plaintiffs, with the exception of Advent Lutheran Church, and Lyle Bohlig and Edgar Gentz, are all members of the ELCA Regular Pension Plan. They are ordained Lutheran Pastors and lay church workers. Advent Lutheran Church is the employer of Rev. Thomas Basich and Rev. Matthew Basich. Plaintiffs Bohlig and Gentz are lay members of ELCA congregations.

On or about June 1988, the Board of Pensions adopted a Policy Statement on South Africa. The Policy Statement provides:

> Whenever the conditions of risk and return are equivalent in the choice among Alternative Funds securities held by the Board on behalf of plan members, or available for purchase, the Board of Pensions has directed that the holdings in companies with South African investments

> will be divested, and similarly, investments in these companies will not be made.

On or about September 28, 1993, plaintiffs filed this case in Hennepin County District Court. Count I of the Complaint is a claim for breach of contract. Count II of the Complaint is a declaratory judgment action and Count III is for Injunctive relief.

On or about November 12, 1993, the Board of Pensions adopted a series of Resolutions relating to South Africa. The first resolution eliminated the South Africa screen from the Social Purpose Funds. The second resolution repealed the Policy statement in its entirety. The third resolution recommended that the church council amend the Plan to provide that retired Plan members be allowed to transfer their interests out of the south Africa Free Funds and to eliminate the South Africa Free Funds if the aggregate value of those funds fall below $20 million.

STANDARD OF REVIEW

Summary judgment is a proceeding designed to determine if issues of fact exist, but, it is not a trial of the issues of fact. Corwine v. Crow Wing County, 244 N.W.2d 482 (Minn. 1976). Rule 56.03 of the Minnesota Rules of Civil Procedure provides that "(j)udgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a mater of law." While summary judgment is intended to secure a just, speedy, and inexpensive disposition, it is not designed as a substitute for a court or jury trial where there are material factual issues to be determined. Vieths v. Thorp Finance Co., 232 N.W.2d 776 (Minn. 1975).

When viewing a motion for summary judgment, the court views the facts in light of the most favorable to the nonmoving party. Campion v. Wright County, 347 N.W.2d 289 (Minn. 1984). The moving party carries the burdens of proof and persuasion to establish the absence of any genuine issue of material fact. Johnson v. Winthorp Laboratories Division of sterling Drug, Inc., 190 N.W.2d 110 (Minn. Ct. App. 1984). Any doubt regarding the existence of a genuine fact issue will be resolved in favor of its existence. Rathburn v. W.T. Grant Co., 219 N.W.2d 641 (Minn. 1972).

Rule 56.05 is designed to require parties to produce sufficient facts in support of their pleading allegations. Bush v. City of Lakefield, 399 N.W.2d 169, 172 (Minn. Ct. 1987). Rule 56.09 states that '[w]hen a motion for summary judgment is made and supported as provided in Rule 56, an adverse party may not rest upon the mere averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

ANALYSIS

Defendants first argue that Count I of the Complaint for breach of contract fails as a matter of law because the relationship of the parties is that of a trust relationship and rescission of the contract, the relief sought, is not available.

Plaintiffs allege that the defendants promised the plaintiffs that they would follow the fiduciary provisions of the Employee Retirement Income Security Act ('ERISA') in administering the ELCA Regular Pension Plan. Specifically, plaintiffs argue that ERISA requires that a plan be managed solely in the interest of the participants for the purpose of providing benefits to participants and the defendants breached

this promise by adding an additional purpose to the ELCA Regular Pension Plan.

This issue turns on the relationship of the parties. The fiduciary provisions of ERISA have been incorporated essentially verbatim in the ELCA Plan Document, the ELCA Trust Document and the Summary Plan Description governing the ELCA Regular Pension Plan which was given to each plaintiff as a participant in the ELCA Plan. This gives some credence to the plaintiffs contract theory. However, the relationship between the parties is not clear to this Court at this time. Thus, material facts are in dispute as to what the parties relationship is. Material facts as those that will affect the results or outcome of the case, depending upon its resolution. Zappa v. Fahey, 245 N.W.2d 258 (Minn. 1976). Therefore, defendants motion for summary judgment as to Count I of the plaintiffs complaint is denied.

Defendants next argue that Count II and Count III of the plaintiffs Complaint fail as a matter of law because those claims are now moot. This Court agrees.

Count II of the plaintiffs Complaint is for declaratory relief and Count III is for injunctive relief. Both Counts relate to the Board of Pensions' political and social investing. However, on November 12, 1993, after this case was filed, the Board of Pensions Executive Committee voted to eliminate the Policy Statement which was the only social policy which affected the alternative Funds.

To render a declaratory judgment, a justiciable controversy must exist. De Antoni v. City of Bloomington, 421 N.W.2d 744, 746 (Minn. Ct. App. 1988). The purpose of injunctive relief is preventive, protective, and prohibitory and as a rule will not issue against discontinued acts unless there are grounds to believe that the conduct or violations will resume. Johnson v. NM Farms Barlett, Inc., 226 Neb. 680, 414 N.W.2d 256, 263 (1987).

In the instant case, there is no longer a present actual controversy since the issue of social and political investments no longer exists. The resolutions on this issue were passed in November 1993, two months after the filing of this litigation. Further, plaintiffs present no facts or evidences to lead this Court to believe that the Board of Pensions will resume this activity. Therefore, Count II and Count III, are dismissed as being moot.

CONCLUSION

For the forgoing reasons, this Court must deny summary judgment as to Count I and dismiss Count II and III as moot.

H.S.C

BOARD OF PENSIONS
EVANGELICAL LUTHERAN
CHURCH IN AMERICA
800 Marquette Ave-sue. Suite 1050 • Minneapolis, Minnesota 55402
• 612-333-7651

CC
Exhibit L
Part 3
Page 1

November 8, 1989

TO: Members of the Church Council

FROM: John G. Kapanke, President

During the October 12-14, 1989 Board of Trustees meeting, the Trustees devoted a considerable amount of time to the Churchwide Assembly resolution regarding divestment. Following extensive discussion, the Board of Trustees voted to adopt a response to the Churchwide Assembly resolution.

Enclosed is the action of the Board of Pensions in response to the Churchwide Assembly call for divestment (Tab 1). In addition, enclosed is a compendium of background information pertaining to the divestment issue. This information reflects matters that were earnestly discussed and debated by the Trustees at their October, 1989 meeting. The Trustees believe that a full understanding of their response is not possible in the absence of an understanding of the background information. In reviewing this material, a special emphasis should be noted of the following:

MINNESOTA PRUDENT TRUSTEE RULE

Minnesota law, which governs the pension plans, requires a trustee to observe the prudent trustee rule in the investment of trust assets unless the governing document provides otherwise. Consequently, the prudent trustee rule will apply to the ELCA pension plans unless it is expressly overridden. Amending the plan documents to override the prudent trustee rule could threaten the tax-deferred status of the pension plans and lead to litigation by Members asserting violation of their contract rights.

EXCLUSIVE BENEFIT RULE

The federal "exclusive benefit rule" applies to the ELCA pension plans because they are tax-deferred retirement income accounts for purposes of section 403 (b) (9) of the Internal Revenue Code. The exclusive benefit rule requires that plan assets be invested in accordance with the prudent trustee standard, and it cannot be overridden by the plan documents or state law. If the plan documents were amended to require the trustees to divest without regard to the prudent trustee rule, then it is likely that the plans' tax-deferred status would be revoked.

INDIVIDUAL LIABILITY

If the plan fiduciaries divested in accordance with 16.5l.C87j regardless of the effect of divestment upon the value of plan assets, then the plan fiduciaries will be exposed to individual liability for losses to the portfolio. In determining whether and to what extent divestment may have caused damage to the plan portfolios, a court is likely to employ hindsight and compare the performance of the ELCA plan portfolios with the performance of similar defined contribution plans.

BREACH OF FAITH

Plan Members, including Predecessor ALC and LCA retirees and current ELCA members with vested accumulations, have relied on promises in pension plan documents and supporting materials relative to the management of the plan assets. Amendments to the plans to permit (or require) social investing, including divestment, would result in a breach of faith with Plan Members. If the Predecessor ALC and LCA pension plans and the ELCA plans are amended to permit (or require) social investing, Plan Members must be offered the opportunity to withdraw their fund balances in lieu of being forced to continue participation in plans where the guidelines have been unilaterally changed.

NEXT STEPS

In addressing the tax and fiduciary law issues raised by the adoption of 16.5l.C87j, the Church Council should be aware that if the Trustees were placed under a mandate to divest all securities of companies with investments in South Africa by September 1, 1991, a group of Members is certain to commence litigation against the Trustees and the ELCA. That litigation would be wide ranging, expensive, emotionally devastating and, perhaps, inconclusive.

If the Church Council believes that the divestment action of the Churchwide Assembly must or should be pursued, then the Board submits that the most efficient means of so doing would be to obtain an IRS ruling as to whether a proposed amendment implementing 16.51.C87j (and generally requiring the Trustees to follow the directions of the ELCA with respect to social investing) would, if adopted, cause the plans to lose their tax-deferred status. If, as seems likely, the IRS rules that

adoption of such an amendment would result in loss of tax-deferred status, then the entire issue of divestment and social investing must be revisited.

On the other hand, if the IRS were to rule that such an amendment would not cause loss of the pension plans' tax-deferred status, then the next step would be for the Trustees, or a group of Members, to request the Hennepin County, Minnesota, District Court to rule on the state law questions involved so that the plan fiduciaries would be protected from exposure to individual liability if they moved ahead with an aggressive program of divestment.

Of primary importance in any litigation, whether commenced by the Plan Members or by the Board in seeking a judicial interpretation, is the cost of such litigation and/or court involvement which will be substantial. The question of who pays for these legal proceedings is of paramount concern to the Trustees. The Plan Members should not be expected to bear the cost of litigation which is commenced as a direct result of a Churchwide Assembly resolution. If litigation is initiated by Plan Members over the divestment issue, it is likely that the courts would rule that the cost of such litigation should be borne by the trusts. The Trustees believe that Plan Members should not be burdened with such costs.

The Board of Pensions wishes to work closely with the Church Council in analyzing issues presented by the Churchwide Assembly resolution on divestment.

JGK/ss

Enclosures

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Case Type 3: Contract

The Reverend Thomas L. Basich, Court File No. 93-16711
The Reverend Matthew J. Basich,
Advent Lutheran Church,
Robert D. Hansen,
Jack R. Kirkham,
Michael Edwin Simonds,
Lyle M. Bohlig,
Edgar Gentz,
The Reverend Judith H. Boal,
The Reverend Doctor Gilbert E. Doan, Jr.,
The Reverend David R. Liefeld
The Reverend Gary G. Scott, **MEMORANDUM OF**
The Reverend Doctor George R. Muenich, **BOARD OF**
The Reverend William J. Cork, **PENSIONS OF**
The Reverend John C. Earp, **THE EVANGELICAL**
Earl Eargle, **LUTHERAN CHURCH IN**
The Reverend Russell E. Saltzman, **AMERICA IN**
The Reverend Carsten Judd Ludder, **SUPPORT OF**
The Reverend Brooke Walker, **MOTION FOR**
The Reverend David A. Carlson, **SUMMARY JUDGMENT**
Matthew C. Headley,
The Reverend William C. Lindholm,
The Reverend Dean W. Hoferer,
The Reverend Thomas J. Lewis,
Raymond Ehrman,
The Reverend John W. Lee,
The Reverend Emmett L. Schmitt,
Richard Herrig,
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David Moris Carlson, Ph.D.,
The Reverend Russell Burr,
The Reverend Charles L. Koester,

missions which are less well off by having the medical-dental plan financed as a percentage of salary. (Id.) The ELCA wishes to ensure that its clergy, layworkers and their families receive adequate benefits regardless of where they are called to serve the ELCA. (Almen Aff., ¶ 29)

7. The Board of Pensions is a non-profit corporate entity which offers certain benefit plans to clergy and lay workers of the ELCA. (Kapanke Affidavit, ¶ 2)

8. The benefit plans offered by the Board of Pensions include lifetime medical and dental benefits, disability benefits, lump sum and monthly survivor benefits and lifetime pension benefits for the clergy/layworker and his/her spouse. (Kapanke Aff., ¶ 7) The benefits comprising each of the benefit plans offered by the Board of Pensions are offered as a "package." (Id.)

9. A congregation is not required to enroll its employees in any benefit plan offered by the Pension Board. (Kapanke Aff., ¶ 9) But if the congregation does enroll an employee, it must enroll its employee in all of the benefits comprising a benefit "package" or none of them.[3] (Kapanke Aff., ¶ 7)

10. Because a minister will only very rarely spend his/her career serving one congregation, the ELCA offers its 11,000 congregations and other affiliated employers a benefits package which is totally portable within the ELCA. (Almen Aff., ¶¶ 9 and 29.) The ELCA benefits package has been designed to continuously provide for plan members and their beneficiaries as they move from one ELCA entity to another. (Almen Aff., ¶ 29.)

11. The Board of Pensions is responsible to three groups -- the ELCA, which sponsors Board programs; the ELCA entities which purchase Board's benefits package for their employees; and plan members and their beneficiaries. (Kapanke Aff., ¶¶ 2, 5 and 6 and Exs. A and B)

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[3] Except that as of January 1, 1995, a plan member who has certain other group coverage may waive the ELCA medical-dental coverage.

12. The congregations who employed the forty-seven individual plaintiffs who are members of the Board's regular pension plan enrolled the plaintiffs in the ELCA benefit plans through the Board of Pensions. (Kapanke Aff., ¶ 11)

13. All forty-seven of the individual plaintiffs have had at least one regular pension account with the Board, consisting of funds which were contributed to the Board by their sponsoring employers on their behalf. (Kapanke Aff., ¶ 11) In addition to regular pension accounts, some individual plaintiffs also have employee voluntary contribution accounts with the Board. (Id.) The voluntary contribution accounts consist of funds they have contributed individually and voluntarily; their total pension account with the Board is the combined total of employer and employee-voluntary contributions. (Id.)

14. The lifetime pension benefits offered by the Board of Pensions is for a lifetime annuity. Retirees are ensured of a guaranteed minimum pension and they receive excess earnings as incremental annuities. (Adams Aff., ¶ 3; Kapanke Aff., ¶ 15)

APPLICATION FOR TRANSFER OF MEMBERSHIP
to the
PENSION AND OTHER BENEFITS PROGRAM
of the
Evangelical Lutheran Church in America
to be effective January 1, 1988

Name _____ (First) (Middle) (Last) Address _____ _____ City _____ State _____ Zip _____	Social Security Number Clergy ☐ Lay ☐ AELC Associate in Ministry ☐ ELCA Synod Affiliation Birth Date | Sex: F ☐ M ☐ Day Phone ( ) Ordination Date (if applicable)
Merging Church Body: AELC ☐ ALC ☐ LCA ☐ Former Membership Number	
Present Marital Status: Single ☐ Married ☐ Separated ☐ Divorced ☐ Widowed ☐	
Name of Spouse (if applicable) _____ (First) (Middle) (Last)	Spouse's Birth Date
Spouse's Social Security Number	Date of Marriage
Name of Spouse's Employer, if spouse is Employed by an ELCA Organization	

INVESTMENT ALTERNATIVES

The ELCA Board of Pensions makes available five funds for the investment of pension contributions to your regular account. All incoming Regular Contributions (Required and Supplemental) must be invested in one or more of these funds.

You can choose how the contributions will be allocated among the funds. You may designate any combination; however, you must designate your choices in 10% increments and the total of the increments must equal 100%. Before the decision is made, it is recommended by the Board of Pensions that the member review the "ELCA Regular Pension Funds Booklet on Investment Choices." The booklet provides information concerning the investment objectives, accounting rules, and transfer rights for each of the funds.

The following elections regarding the investment of future incoming Regular Contributions can be changed at quarterly intervals:

Percentage (10% Increments)	Fund
_____%	Bond Fund
_____%	Balanced Fund
_____%	Equity Fund
_____%	Social Purpose Bond Fund
_____%	Social Purpose Equity Fund
100 % TOTAL	

NOTE: If you do not designate a choice, 100% of your incoming Regular Contributions will be invested in the ELCA Bond Fund.

(PLEASE COMPLETE PAGE 2)

4 132940

SALARY INFORMATION

	Salary-Paying Organization A	Salary-Paying Organization B
Name		
Address		
1. Cash Salary		
a. Annual Base Salary	$	$
b. Clergy Social Security Tax Allowance (if provided)		
2. Total of (1a + 1b)	$	$
3. Housing: Check Applicable Box ☐ Cash Housing Allowance OR ☐ 35% of Line 2 if Parsonage or other housing is provided		
4. Household Furnishings and Utilities Allowances (only if Parsonage is provided)		
5. DEFINED COMPENSATION [Total of (2) + (3) + (4)]	$	$

If more than two salary-paying organizations will participate, please use a separate sheet.

CHECK BOX, IF APPLICABLE
- ☐ On Leave from Call/Appointment
- ☐ Receiving Severance Benefits from a National Church Office, Synod, or LCUSA

PENSION CONTRIBUTIONS

The employer must contribute Required Contributions for each Member whom the employer enrolls. The amount of the Required Contribution is determined as a percent of defined compensation.

The employer may make Supplemental Contributions for members. No such contributions are required as a condition for participation in the Pension and Other Benefits Program. However, some employers may be obligated by employment agreements to make additional contributions on behalf of members (such as those who elected to maintain the pension contribution rate at, or increase it to, 12%).

REQUIRED PENSION CONTRIBUTIONS			SUPPLEMENTAL CONTRIBUTIONS
Attained Age on December 31, 1987	Contribution Rate	Check According to Your Age	Please Enter Contribution Rate or Amount
53 or over	12%	—	
45 - 54	11	—	_____ %
35 - 44	10	—	OR
34 or under	9	—	$ _____ per month

(PLEASE COMPLETE PAGE 3)

BENEFICIARY DESIGNATION

The individual(s) named as Beneficiary(ies) below shall receive the following benefits:

I. REGULAR PENSION PLAN ACCUMULATIONS

If after my death and after all benefits have been funded for my Surviving Spouse* or if there is no Surviving Spouse, for my Eligible Surviving Child(ren) (under age 21 or totally and permanently disabled prior to attaining age 21) any portion remains of my pension accumulation from my ELCA Regular Pension Plan Account, then the individual(s) named below as my Beneficiary(ies) who survive(s) me shall be entitled to lump-sum payment(s) from my Account. I understand that if I do not designate my child(ren) as a Beneficiary, the ELCA Regular Pension Plan will not provide my child(ren) any benefit unless my spouse predeceases me and my child(ren) is under age 21 at my death (or was totally and permanently disabled prior to age 21).

*A married member may name a primary Beneficiary other than a Surviving Spouse if the Spouse gives written consent on a form available from the Board of Pensions. If such an election is made and the member dies leaving orphaned children who are under age 21 or disabled, they will not be entitled to any special benefit from the ELCA Regular Pension Plan.

NAME	DATE OF BIRTH	RELATIONSHIP	SOCIAL SECURITY NUMBER, IF ANY	PERCENT SHARE
				100%

II. LUMP-SUM SURVIVOR BENEFIT

If I should die while covered for a Lump-sum Survivor Benefit, then the individual(s) named below as my Beneficiary(ies) who survive(s) me shall be entitled to payment(s).

NAME	DATE OF BIRTH	RELATIONSHIP	SOCIAL SECURITY NUMBER, IF ANY	PERCENT SHARE
				100%

If your Beneficiary is not designated on an approved form filed prior to your death, your Beneficiary will be the person or persons who survive you in the first of the following four classes in which there is a survivor, share and share alike:

1. Your surviving legal spouse.
2. Your surviving children.

   However, if a child of yours dies before you die and that deceased child leaves surviving descendants (your grandchildren, or, in the rare event that a grandchild is also deceased, your great-grandchildren) those descendants will take the share that their deceased parent would have taken had he/she not died before you died.
3. Your surviving parents.
4. Your surviving brothers and sisters.

If none of the above survives you, your Beneficiary will be your estate.

Date _____ Signature of Member X _____

(PLEASE COMPLETE PAGE 4)

MEDICAL AND DENTAL BENEFITS COVERAGE FOR SPOUSE AND CHILDREN

Spouses (including separated spouses) and eligible children are automatically enrolled for medical-dental benefits coverage at the same the member is enrolled. Eligible children include unmarried (1) natural children, (2) step-children living in the same household as the member, (3) legally-adopted children, and (4) individuals placed in the member's household as a step toward legal adoption by the member. Such children must be (a) under age 19, (b) under age 25 if enrolled as a full-time student in an educational institution approved by the Board, or (c) totally and permanently disabled as the result of a disability incurred prior to the child's attainment of age 21 and while the child was covered under the ELCA or predecessor church medical plan.

List spouse and children for whom coverage will be provided. For a child age 19 or older, please indicate the child's status as "student" or "disabled."

Name(s)	Birth Date	Status	Sex	Name of other Medical-Dental Coverage (if applicable)
			F☐ M☐	
			F☐ M☐	
			F☐ M☐	
			F☐ M☐	
			F☐ M☐	

I hereby agree to participate in the Pension and Other Benefits Program of the Evangelical Lutheran Church in America, and agree to be bound by the terms and conditions of the plan documents of the several employee-benefit plans.

Date _____ Signature of Sponsored Member: X _____

We hereby declare the above-named employee to be eligible for participation in the Pension and Other Benefits Program of the Evangelical Lutheran Church in America, and we approve the above agreement for the employee to participate, and agree to sponsor the employee, in such program.

Participating Employer (Congregation/Organization): _____

Date _____ By (Signature): X _____

Title: _____

When completed, please return to:

ELCA BOARD OF PENSIONS
P.O. Box 59029
Minneapolis, Minnesota 55459-0029

Form 181

4 132943

Plan Document

ELCA Regular Pension Plan

BOARD OF PENSIONS
Evangelical Lutheran Church in America
800 Marquette Ave., Suite 1050 • Minneapolis, MN 55402 • (612) 333-7651

August 24-25, 1993

2 148581

(d) Court System. In the event a Member has exhausted the appeals procedure set forth in Sec. 11-04(a), (b), and (c) and is dissatisfied with the final decision of the governing board of the ELCA Board of Pensions, the Member may initiate legal action in the Minnesota Fourth Judicial District Court, Hennepin County. Any removal of such action must be to the United States Court for the District of Minnesota.

Sec. 11.05 Correction of Errors. It is recognized that in the operation and administration of the Regular Pension Plan certain mathematical and accounting errors may be made or mistakes may arise for several reasons including by reason of factual errors in information supplied to the ELCA Board of Pensions or to the Regular Pension Trustees. The ELCA Board of Pensions shall have the power to cause such equitable adjustments to be made to correct such errors as the ELCA Board of Pensions, in its sole discretion, considers appropriate. Such adjustments shall be final and binding on all persons.

Sec. 11.06 Fiduciary Standards. Each fiduciary shall discharge her/his duties with respect to the Regular Pension Plan, solely in the interests of Members, and in accordance with the following requirements:

(a) For the exclusive purpose of providing benefits to Members and defraying

reasonable expenses of administering the Regular Pension Plan,

(b) With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims,

(c) By diversifying the investments of the Regular Pension Plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so, and

(d) In accordance with the provisions of this Regular Pension Plan and the Regular Pension Trust.

Nothing herein shall be construed or applied to restrict or prohibit the fiduciaries from administering any Investment Fund, including any ELCA South Africa Free Fund and any ELCA Social Purpose Fund, in accordance with the investment objectives and policies from time to time established for such Investment Funds, and the fiduciaries shall not be liable to any Member or other person solely by reason of their adherence to such investment objectives and policies.

Sec. 11.07 No Other Benefits. No benefits other than those specifically provided for herein are to be provided under the Regular Pension Plan.

Sec. 11.08 Source of Benefits. All benefits to which a person becomes entitled hereunder shall be provided only out of the appropriate Fund(s) and only to the extent that such Fund(s) is/are adequate therefor.

Sec. 11.09 Limitation of Liability. The ELCA Board of Pensions shall not be liable to any Member for the failure of any Participating Employer to sponsor an individual as a Sponsored Member in accordance with the policies and practices of such Participating Employer, or in accordance with any contract between the Eligible Employee and the Eligible Employer, or in accordance with Section 3.03(a), whether or not the ELCA Board of Pensions or any representative of any part of the ELCA has actual knowledge of such failure to enroll. The sole remedy of the ELCA Board of Pensions is to involuntarily terminate the status of the entity as a Participating Employer pursuant to Sec. 2.04(b). Furthermore, the ELCA Board of Pensions shall not be liable to any Member for any claim based on its failure to involuntarily discontinue such entity's status as a Participating Employer, whether or not the ELCA Board of Pensions or any other part of the ELCA had actual knowledge of the facts that would justify the involuntary termination of the entity's status as a Participating Employer.

Trust Document

ELCA Regular Pension Trust

BOARD OF PENSIONS
Evangelical Lutheran Church in America
800 Marquette Ave., Suite 1050 • Minneapolis, MN 55402 • (612) 333-7651

January 1, 1993

ARTICLE VII: MISCELLANEOUS

Sec. 7.01 Benefits May Not Be Assigned or Alienated. Except as otherwise expressly permitted by the Regular Pension Plan, or required by law, the interests of participants and their beneficiaries under the Regular Pension Plan or this Agreement may not in any manner whatsoever be assigned or alienated, whether voluntarily or involuntarily, directly or indirectly.

Sec. 7.02 Incompetent Payee. If in the opinion of the ELCA Board of Pensions a person to whom the Regular Pension Trustees are directed to make one or more payments is disabled from caring for her/his affairs because of mental or physical condition, payment due such person may be made to such person's guardian, conservator, or other legal personal representative upon furnishing the ELCA Board of Pensions with evidence satisfactory to the ELCA Board of Pensions of such status. Prior to the furnishing of such evidence, the ELCA Board of Pensions may cause payments for the person under disability to be made, for such person's use and benefit, to any person or institution then in the opinion of the ELCA Board of Pensions caring for or maintaining the person who is under the disability. The Regular Pension Trustees shall have no liability with respect to payments made to an individual designated by the ELCA Board of Pensions. The Regular Pension Trustees shall have no duty to make inquiry as to the competence of any person to whom it is directed to make payment.

Sec. 7.03 Evidence. Evidence required of anyone under this Agreement may be by certificate, affidavit, document, or other instrument which the person acting in reliance thereon considers to be pertinent and reliable, and to be signed, made, or presented by the proper party.

Sec. 7.04 Dealings of Others With Regular Pension Trustees. No person (corporate or individual) dealing with the Regular Pension Trustees shall be required to see to the application of any money paid or property delivered to the Regular Pension Trustees or to determine whether the Regular Pension Trustees are acting pursuant to any authority granted to them under this Agreement.

Sec. 7.05 Fiduciary Standards. Each fiduciary shall discharge her/his duties with respect to the Regular Pension Trust, solely in the interests of the Members and in accordance with the following requirements:

(a) For the exclusive purpose of providing benefits to participants in the Regular Pension Plan and their beneficiaries and defraying reasonable expenses of administering the Regular Pension Trust,

(b) With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in

the conduct of an enterprise of a like character and with like aims,

(c) By diversifying the investments of the Regular Pension Trust so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so, and

(d) In accordance with the provisions of this Regular Pension Trust and the Regular Pension Plan.

Nothing herein shall be construed or applied to restrict or prohibit the fiduciaries from administering any Investment Fund, including any ELCA South Africa Free Fund and any ELCA Social Purpose Fund, in accordance with the investment objectives and policies from time to time established for such Investment Fund, and the fiduciaries shall not be liable to any Member or other person solely by reason of their adherence to such investment objectives and policies.

Sec. 7.06 Expenses of the ELCA Board of Pensions. The ELCA Board of Pensions shall be reimbursed from the Regular Pension Trust for all reasonable costs of administering the Regular Pension Plan, incurred by the ELCA Board of Pensions, including costs associated with informing the employees and employers of the availability of the Regular Pension Plan. Such reimbursements shall be paid from the Regular Pension Trust in such proportions as the ELCA

Board of Pensions shall determine and shall constitute a lien upon the Regular Pension Trust until paid.

Sec. 7.07 Audits. The ELCA Board of Pensions shall have the right to cause the books, records, and accounts of the Regular Pension Trustees that relate to the Regular Pension Plan to be examined and audited by independent auditors designated by the ELCA Board of Pensions at such times as the ELCA Board of Pensions may determine, and the Regular Pension Trustees shall make such books, records, and accounts available for such purposes at all reasonable times. The expense of such audit shall be paid from the Regular Pension Trust, if not paid by the Participating Employers in such proportion as the ELCA Board of Pensions shall determine, and shall constitute a lien upon the Regular Pension Trust until paid.

Sec. 7.08 Successors. The provisions of this Agreement shall be binding on each Participating Employer and its successors. If a successor to a Participating Employer or a purchaser of all or substantially all of a Participating Employer's assets is eligible to, and elects to, continue the Regular Pension Plan, such successor or purchaser shall be substituted for the Participating Employer under this Agreement.

Sec. 7.09 Waiver of Notice. Any notice required under this Agreement may be waived by the person entitled thereto.

Sec. 7.10 Headings. Headings at the beginning of articles and sections are for convenience of reference, shall not be considered a part of this Agreement, and shall not influence its construction.

Sec. 7.11 Use of Compounds of Word "Here". Use of the words "hereof", "herein", "hereunder", or similar compounds of the word "here" shall mean and refer to the entire Agreement unless the context clearly indicates otherwise.

Sec. 7.12 Construed as a Whole. The provisions of this Agreement shall be construed as a whole in such manner as to carry out the provisions thereof and shall not be construed separately without relation to the context.

Sec. 7.13 Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original. Such counterparts shall constitute but one and the same instrument, which may be sufficiently evidenced by any one counterpart.

Sec. 7.14 Indemnification of Regular Pension Trustees. The Participating Employers jointly and severally agree to indemnify each of the Regular Pension Trustees for and to hold each harmless against any and all liabilities, losses, costs, or expenses (including legal fees and expenses) of whatsoever kind and nature which may be imposed on, incurred by, or asserted

1992 Summary Plan Description

ELCA Regular Pension Plan

Including Investment Options

BOARD OF PENSIONS
Evangelical Lutheran Church in America

EXHIBIT C

ABOUT THIS BOOKLET

Introduction

The Board of Pensions of the Evangelical Lutheran Church in America administers the ELCA Pension and Other Benefits Program which provides pensions and benefits for Ordained Ministers, Associates in Ministry and Lay Employees of the ELCA under ALL of the following Plans:

- Regular Pension Plan*
- Medical and Dental Benefits Plan
- Disability Benefits Plan
- Survivor Benefits Plan

** The ELCA Optional Pension Plan (not described in this booklet) is also available to Members who participate in the Regular Pension Plan.*

These Plans provide a continuity of benefits for Plan Members as they serve various congregations and/or church-related organizations throughout their church career.

This Summary Plan Description provides information on the Regular Pension Plan, including the nine investment options.

Defined Contribution Plan

The Regular Pension Plan is a "defined-contribution" plan. Under this Plan a fixed percentage of the Member's salary is contributed to the Member's Account.

Regular Pension Plan contributions may come from: "Required Contributions" and "Additional Contributions." The "Required Contribution" is determined as a percent of the Member's "defined compensation." Employers must contribute "Required Contributions" for everyone enrolled in

the Regular Pension Plan. Employers may also make extra contributions known as "Additional Contributions." Tax laws limit the amount of "Additional Contributions" that the employer may contribute for a Member's benefit. The Board will calculate that limit upon request.

Contributions are credited to separate Accounts in the Regular Pension Plan depending on the Member's election within the nine investment options. The investment funds are managed on behalf of Plan Members, based on long-term investment goals.

This Plan is an Important Part of a Member's Financial Security

The primary purpose of the Regular Pension Plan is to provide Plan Members and their beneficiaries with retirement income. The employer contributions to the Member's Account under this Plan are an important part of financial security in retirement Additionally, Social Security, personal savings, home ownership and contributions made to the Optional Pension Plan also contribute to a Plan Member's financial security at retirement.

At retirement, the Member's total Account, that is, all contributions plus investment earnings, form the basis for calculating the retirement pension (monthly annuity).

Members are encouraged to read this booklet carefully.

This Booklet is a Summary of the ELCA Regular Pension Plan

This Summary Plan Description summarizes the Regular Pension Plan and investment options, effective January 1, 1992. As a summary, it cannot deal with every conceivable set of circumstances. In all cases, the Member's rights under the Regular Pension Plan are governed by the Plan's legal

document. If, in a set of circumstances, this summary is inconsistent with the Plan document, the legal document will control.

A copy of the legal document for this Plan may be obtained from the Interpretation Department of the Board of Pensions.

FIDUCIARY STANDARDS

Prudent Investor Rule

The board of directors or trustees administering or investing pension assets are bound by the "prudent investor" rule. This common law concept has evolved through the years and is set forth in the American Law Institute's **Restatement of the Law of Trusts, Third,** section 227, which states in part that:

Sec. 227 General Standard of Prudent Investment

The trustee is under a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements and other circumstances of the trust.

(a) This standard requires the exercise of reasonable care, skill and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust.

(b) In making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so.

Many states, including Minnesota, have incorporated the prudent investor rule in their statutes. The ELCA Board of Pensions, a Minnesota nonprofit corporation, is governed by Minnesota Statutes, § 501B.10, which sets out the statutory requirements governing trust investments and states in part as follows:

Sec. 501B.10 Kinds of Property a Trustee may Acquire.
Subd.1. General Properties and Investments.

(a) A trustee may invest in every kind of real or personal property and every kind of investment that a prudent person would invest in having in mind the preservation of the trust estate and the amount and integrity of the income derived. This permission includes, but is not limited to, bonds, debentures, and other individual or corporate obligations, mutual funds, and corporate stocks. In considering an investment, a trustee shall exercise the care, skill and judgment under the circumstances then prevailing that a person of ordinary prudence would exercise in the management of the person's own property and shall consider the role that the investment plays within the trust's overall portfolio of assets.

1974 ERISA Standards

While the so-called Church "exemption" removes church pension trusts from the requirements of the Employee Retirement Income Security Act (ERISA), there can be little doubt that any judge, whether state or federal, in analyzing the propriety of Board actions, would look to the standards established in ERISA. In 1974 Congress, in enacting ERISA, codified the prudent person rule by enacting the so-called "sole interest" and "exclusive purpose" rules. 29 United States Code Sec. 1104(a)(1) defines the prudent person standard of care as follows:

Sec. 1104. Fiduciary Duties

*(a) **Prudent Man Standard of Care.** (1) Subject to sections 1103(c) and (d) [ERISA Sec. 403(c) and (d)], 1342 [ERISA Sec. 4042], and 1344 [ERISA Sec. 4044], of this title, a fiduciary shall discharge his duties with respect to*

a plan solely in the interest of the participants and beneficiaries and-

(A) for the exclusive purpose of:
  (i) providing benefits to participants and their beneficiaries; and
  (ii) defraying reasonable expenses of administering the plan;
(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

1982 TEFRA Standards

Code Sec. 403 (B)(9) which enables the ELCA to form a 403(b)(9) "church Plan." was enacted as part of the Tax Equity and Fiscal Responsibility Act of 1982. The Conference Report imposes the exclusive benefit and nondiversion rules as follows:

The conferees also intend that the assets of a church plan . . . cannot be used for or diverted to purposes other than for the exclusive benefit of employees and their beneficiaries. Of course, the reasonable costs of administering a retirement income account . . . may be charged against the account. Such costs include the reasonable costs of administering a retirement income program of which the account is a part,

including costs associated with informing employees and employers of the availability of the program.

1993
Brief Summary

ELCA Pension and
Other Benefits Program

BOARD OF PENSIONS
Evangelical Lutheran Church in America

EXHIBIT D

Regular Pension Plan

New Plan Provision–1993

- **The minimum Required Pension Contribution (9.0 percent previously) will be increased to 9.5 percent.**

The Regular Pension Plan is designed to provide you with a monthly retirement income. The congregation or organization you serve contributes a percentage of your "monthly defined compensation" toward the Plan. The amount contributed is credited to your personal Account and is immediately vested (belongs to you). You receive quarterly statements of the balance in your Account and annual projections of your retirement income.

Contributions are tax-deferred
All contributions made on your behalf to the Regular Pension Plan are "before-tax." In other words, federal income tax is not paid on these contributions at the time they are made. Taxes are deferred until benefits are paid to you.

Earnings and Account Valuations
Bond and Balanced Fund investments are credited with investment earnings each year. Equity Fund investments are adjusted to the market value of the underlying securities each month. There is, however, a one- to two-month delay in this valuation.

Withdrawal provisions
The Regular Pension Plan is designed to provide you and your spouse with a lifetime income. Your Basic Pension Account (employer contributions) can be converted only to monthly payments. Withdrawals are not permitted, except when there

is a Separation from Service and your Account balance is less than $5400. A lump sum withdrawal can also be made at retirement if your monthly pension is calculated at less than $40. Member contributions made to predecessor church pension plans have different rules.

Death benefits before retirement
If you die before pension payments begin, your spouse immediately receives a lifetime monthly pension based on the balance of your pension Account. If you have no spouse upon death, part or all of your Account will be used to provide a pension for surviving children under age 21. Any remainder of your Account will be paid to your designated beneficiary or to your estate. Additional benefits may also be payable from the Survivor Benefits Plan.

Benefits for divorced spouse
A portion of a pension Account may be assigned by a court to a divorced spouse. A brochure entitled *When There is Divorce* is available upon request from the Board of Pensions.

How benefits are calculated
Monthly pension benefits under this Plan are based on:

- The amount of **contributions** credited to your Account upon retirement;
- The amount of **investment earnings** credited to your Account upon retirement;
- The **form of payment** you select; and
- **Your age** (and your spouse's age, if applicable) when you begin receiving payments.

You may begin receiving pension payments upon retirement as early as age 60 or after 30 years of service. However, payments must begin no later than age 70 1/2, even if you are

still employed. You may choose from the following forms of payment:

- Single Life Pension (with spouse's consent);
- Joint Pension, with 60 percent to your surviving spouse (with spouse's consent);
- Joint Pension, with 75 percent to either you or your spouse, as survivor; or
- Joint Pension, with 100 percent to either survivor.

Summary of Investment Funds

The Regular Pension Plan offers nine investment choices for your Basic Pension Account. Before making your decision, however, you should read the booklet entitled *Summary Plan Description–Regular Pension Plan including Investment Options* available from the Board of Pensions.

Evangelical Lutheran Church in America

CONSTITUTIONS, BYLAWS, AND CONTINUING RESOLUTIONS

as adopted by the Constituting Convention
of the Evangelical Lutheran Church in America
(April 30, 1987)

and

as amended by the
First (1989), Second (1991), and Third (1993)
Churchwide Assemblies
of the Evangelical Lutheran Church in America

Edition current as of September 1993

Chapter 12.
CHURCHWIDE ASSEMBLY

12.10. Description and Authority of the Churchwide Assembly

12.11. The Churchwide Assembly shall be the highest legislative authority of the churchwide organization and shall deal with all matters which are necessary in pursuit of the purposes and functions of this church. The powers of the Churchwide Assembly are limited only by the provisions of the Articles of Incorporation, this constitution and bylaws, and the assembly's own resolutions.

12.20. Duties of the Churchwide Assembly

12.21. The Churchwide Assembly shall:

a. Review the work of the churchwide officers, and for this purpose require and receive reports from them and act on business proposed by them.
b. Review the work of the churchwide units, and for this purpose require and receive reports from them and act on business proposed by them.
c. Receive and consider proposals from synod assemblies.
d. Establish churchwide policy.
e. Adopt a budget for the churchwide organization.
f. Elect officers, board members, and other persons as provided in the constitution or bylaws.
g. Establish churchwide units to carry out the functions of the churchwide organization.

h. Have the sole authority to amend the constitution and bylaws.
i. Fulfill other functions as required in the constitution and bylaws.
j. Conduct such other business as necessary to further the purposes and functions of the churchwide organization.

12.30. Meetings of the Churchwide Assembly

12.31. The assembly shall meet biennially in regular session. Special meetings may be called by a two-thirds vote of the Church Council. The purpose for a special meeting shall be stated in the notice.

12.31.01. The time and place of the Churchwide Assembly shall be determined by the Church Council. The time and place for the next regular assembly normally shall be announced at the preceding assembly.

12.31.02. The secretary shall give notice of the time and place of each regular assembly by publication thereof at least 60 days in advance in this church's periodical. The secretary shall give written notice of a special assembly to the bishop of each synod upon the issuance of a call thereof and shall publish the same in this church's periodical at least 30 days in advance of the special assembly. Written notice shall be mailed to all voting members not more than 30 days nor less than 10 days in advance of any meeting.

12.31.03. At least 20 days prior to an assembly the secretary shall prepare and distribute to each congregation and to the voting members-elect a preassembly report.

12.31.04. The arrangements for agenda, program, and worship shall be under the supervision of the bishop.

12.31.05. Physical arrangements for churchwide assemblies shall be made by the secretary or by an assembly manager working under the secretary's supervision. Such committees as may be necessary to facilitate the planning for and operation of the assembly may be established by the secretary in consultation with the bishop.

12.31.06. The churchwide organization shall be responsible for the costs of the Churchwide Assembly, including reasonable costs for travel, housing, and board for voting and advisory members.

12.31.07. At least one-half of all persons elected as voting members must be present at a meeting to constitute a quorum for the legal conduct of business. If such a quorum is not present, those voting members present may adjourn the meeting to another time and place, provided that only those persons eligible to vote at the original meeting may vote at the adjourned meeting.

12.31.08. Proxy and absentee voting shall not be permitted at a Churchwide Assembly.

12.31.09. The Churchwide Assembly shall use parliamentary procedures in accordance with Robert's Rules of Order, latest edition, unless otherwise ordered by the assembly.

12.40. Members of the Churchwide Assembly

12.41. The voting members of the Churchwide Assembly shall be the voting members of this church. The requirements for voting members of the assembly and other members shall be specified in the bylaws.

12.41.10. Voting Members

12.41.11. Each synod shall elect one voting member of the Churchwide Assembly for every 6,500 baptized members in the synod. In addition, each synod shall elect one voting member for every 50 congregations in the synod. The synod bishop, who is ex officio a member of the Churchwide Assembly, shall be included in the number of voting members so determined. There shall be at least two voting members from each synod. The secretary shall notify each synod of the number of assembly members it is to elect.

12.41.12. The secretary of each synod shall submit to the secretary of this church at least four months before the assembly a certified list of the regular and alternate voting members elected by the synod.

12.41.13. Each voting member of the Churchwide Assembly shall be a voting member of a congregation of this church and shall cease to be a member of the assembly if no longer a voting member of a congregation of this church. The criterion for voting membership in the congregation from which the voting member is elected shall be in effect regarding minimum age for that voting member.

12.41.14. Voting members elected through the process of 12.41.11 through 12.41.13. shall begin serving with the opening of a regular Churchwide Assembly and shall continue serving until voting members are seated at the next regular Churchwide Assembly.

12.41.15. Except as defined in 12.41.21., employees of the churchwide organization, including those serving

under call, appointment, employment agreement, or contract, shall not be eligible for election and service as voting members of the Churchwide Assembly

12.41.20. Ex Officio Members

12.41.21. The officers of this church and the bishops of the synods shall serve as ex officio members of the Churchwide Assembly. They shall have voice and vote.

12.41.30. Advisory Members

12.4131. Members of the Church Council and board chairpersons or their designees, unless elected as voting members, shall serve as advisory members of the Churchwide Assembly Executive directors of churchwide units, the executive for administration, and executive assistants to the bishop shall serve as advisory members of the Churchwide Assembly.

12.4132. Advisory members shall have voice but no vote.

12.41.40. Other Non-Voting Members

12.41.41. Other categories of non-voting members may be established by the Churchwide Assembly.

12.41.A89. *Presidents of the colleges, universities, and seminaries of this church, unless elected as voting members of the assembly, shall have voice but not vote.*

12.50. Committees of the Churchwide Assembly

12.51. The Churchwide Assembly shall have a Reference and Counsel Committee, a Memorials Committee, and a Nominating Committee. The description of these committees shall be in the

bylaws. The Churchwide Assembly may authorize such other committees as it deems necessary.

12.51.10. Reference and Counsel Committee

12.51.11. A Reference and Counsel Committee, appointed by the Church Council, shall review all proposed changes or additions to the constitution and bylaws and other items submitted that are not germane to items contained in the stated agenda of the assembly.

12.51.20. Memorials Committee

12.51.21. A Memorials Committee, appointed by the Church Council, shall review memorials from synodical assemblies and make appropriate recommendations for assembly action.

12.51.30. Nominating Committee

12.51.31. A Nominating Committee, elected by the Churchwide Assembly, shall nominate two persons for each position for which an election will be held by the Churchwide Assembly and for which a nominating procedure has not otherwise been designated in the constitution and bylaws of this church.